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N 2997

No. 14835

United States
Court of Appeals
For the Ninth Circuit.

YOUNG AH KWAI and YOUNG AH CHOR,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii

FILED

DEC 27 1955

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-2-55

No. 14835

United States
Court of Appeals
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YOUNG AH KWAI and YOUNG AH CHOR,

Appellants,

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Appeal from the United States District Court for the District of Hawaii

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-2-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Plaintiff, Young Ah Kwai:

W. Y. CHAR, ESQ.,
942 Maunakea Street,
Honolulu, T. H.

For the Defendant, John Foster Dulles, etc.:

LOUIS B. BLISSARD,
United States Attorney;

CHARLES B. DWIGHT, III, ESQ.,
Assistant U. S. Attorney,
Federal Building,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii
Civil No. 1110

YOUNG AH KWAI and YOUNG AH CHOR,

Plaintiffs,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Defendant.

COMPLAINT UNDER SECTION 503 UNITED STATES NATIONALITY ACT (8 USCA, SECTION 903)

Amended Complaint

I.

That the Plaintiffs are citizens of the United States; that they were born in Sun Mun Tung Village, Lung Doo, Chungshan, Kwantung, China, Ah Kwai on CR 9-8-15 (October 14, 1926) and Ah Chor on CR 11-2-13 (November 28, 1924); that they resided in Sun Mun Tung Village aforesaid; and that they claim their United States citizenship by reason of the fact that they are the sons of Young Yick, also known as Young Yick Chong, a citizen of the United States who resided in the United States prior to the birth of the Plaintiffs; and that they claim Hawaii as their residence.

II.

That the Defendant, John Foster Dulles, is the Secretary of the Department of State of the Gov-

ernment of the United States of America and is the head of the United States Foreign Service, with central offices located in Washington, D. C.

That the said Young Yick, also known as Young Yick Chong, was born in Honolulu, City and County of Honolulu, Territory of Hawaii, on the 11th day of April, 1895; that he is and always has been a citizen of the United States of America and is a permanent resident of Honolulu aforesaid, having resided continuously in said Honolulu since birth, with the exception of three (3) trips to China, departing and returning to Honolulu, T. H., on the dates and vessels shown below:

1. Departed from Honolulu in September, 1897, on the SS "Coptic."
   Returned to Honolulu in November, 1921, on the SS "Taiyo Maru."

2. Departed from Honolulu on October 10, 1934, on the SS "President Coolidge."
   Returned to Honolulu in 1935 on the SS "President Coolidge."

3. Departed from Honolulu in 1947 on the SS "Marine Lynx."
   Returned to Honolulu in May 19, 1948, on a Philippine Air Line plane.

IV.

That the said Young Yick, also known as Young Yick Chong, has in his possession as evidence of his United States citizenship, an Order and Judgment

issued on the 6th day of May, 1950, by the District Court of the United States for the District of Hawaii, declaring said Young Yick, also known as Young Yick Chong, to be a national of the United States by virtue of his birth at Palama, Oahu, Territory of Hawaii, on or about April 11, 1895; that he has also a Certificate of Citizenship-Hawaiian Islands, issued to him by the Immigration and Naturalization Station in Honolulu, T. H.

V.

That Young Yick, also known as Young Yick Chong, was married to Young Hoong Shee on the 28th day of the 2nd month of the 6th year of the Chinese Republic (March 21, 1917) in Sun Mun Tung Village, Lung Doo, Chungshan, Kwangtung, China; that from said marriage were born four (4) sons, whose names, dates of birth, places of birth and present addresses are as follows:

Young Ah Choy. CR 7-4-8 (July 30, 1919). Sun Mun Tung Village, Lung Doo, Chungshan, Kwangtung, China. Last known address: Kwong Moon, Kwangtung, China.

Young Ah Kwai, Plaintiff herein, CR 9-8-15 (Oct. 14, 1926). Sun Mun Tung Village, Lung Doo, Chungshan, Kwangtung, China. Honolulu, T. H.

Young Ah Chor, Plaintiff herein, CR 11-2-13 (Nov. 28, 1924). Sun Mun Tung Village, Lung Doo, Chungshan, Kwangtung, China. Honolulu, T. H.

Young Lum Jip. 22nd day, 9th month (Chinese Calendar) in the year 1935 (Oct. 19, 1935). Sun

Mun Tung Village, Lung Doo, Chungshan, Kwangtung, China. Honolulu, T. H.

VI.

That on February 13, 1951, Plaintiffs submitted to the American Consulate General at Hong Kong their applications for recognition as American citizens; that said applications were supported by an affidavit executed by Plaintiffs' father, Young Yick, also known as Young Yick Chong, identifying Plaintiffs as his sons and supporting their claims to citizenship; that, subsequently, they submitted an affidavit by Lee Yau Ting identifying Young Yick, also known as Young Yick Chong, as the rightful owner of the Order and Judgment issued on the 6th day of May, 1950, by the District Court of the United States for the District of Hawaii, declaring Young Yick, also known as Young Yick Chong, to be a national of the United States by virtue of his birth at Palama, Oahu, Territory of Hawaii, on or about April 11, 1895; that said applications and supporting affidavits were submitted for the purpose of documentation as American citizens to enable Plaintiffs to enter and reside in the United States as American citizens; that on July 10, 1951, Young Ah Kwai and Young Ah Chor each executed a formal passport application at the American Consulate General at Hong Kong; that Plaintiffs have complied with all of the requirements of said American Consulate General for information as to their United States citizenship.

That R. B. Shipley, Chief, Passport Division, Department of State, Washington, D. C., informed Sau Ung Loo Chan, Plaintiffs' former attorney, by speedletter, dated October 16, 1951, that said Young Ah Kwai and Young Ah Chor were refused documentation by the Consulate General at Hong Kong; that a copy of said speedletter is hereto attached, marked Exhibit "A," and made a part hereof.

That H. E. Montamat, American Consul at Hong Kong, by letters dated October 22, 1951, one addressed to Young Ah Kwai and another addressed to Young Ah Chor, disapproved each applicant's passport application and denied to each a travel affidavit to enable him to travel to the United States; that copies of said letters are hereto annexed, marked Exhibits "B" and "C," respectively, and made parts hereof.

VII.

That the Defendant is the duly appointed, qualified and acting Secretary of State of the United States; that the American Consulate General at Hong Kong is an official executive of the Defendant herein; that the Plaintiffs, and each of them, as United States citizens, claim all the rights or privileges to which citizens of the United States are entitled; that Plaintiffs, and each of them, had requested the American Consulate General to issue to them United States passports or equivalent documents to enable them to enter and take up permanent residence, as United States citizens, in the United States; that Defendant, by and through his

official executives, has refused to issue to Plaintiffs, and each of them, a United States passport or any other travel document upon the ground that they are not nationals of the United States; that the issuance of a United States passport or equivalent document by the Defendant is a right and/or privilege to which each of the Plaintiffs is entitled as a United States citizen; that Defendant's denial of Plaintiffs' passport applications, executed on July 10, 1951, and refusal to afford the Plaintiffs, facilities for the execution of affidavits for the purpose of travelling to the United States is the denial of a right and/or privilege of citizens and/or nationals of the United States upon the ground that the Plaintiffs are not nationals of the United States.

VIII.

That, as a result of the American Consulate's disapproval of Plaintiffs' applications and refusal to issue to Plaintiffs United States passports or equivalent travel documents, Plaintiffs are unable to enter and reside in the United States, and such refusal is a denial of their rights and privileges upon the ground that they are not nationals of the United States.

Wherefore, Plaintiffs pray for judgment and decree adjudging that they are citizens and/or nationals of the United States and as such are entitled to the rights and/or privileges of citizens and/or nationals of the United States, including the right to be issued United States passports and the right to enter and reside in the United States of America.

Dated: Honolulu, T. H., this 12th day of November, 1954.

YOUNG AH KWAI, and
YOUNG AH CHOR,
Plaintiffs;

By /s/ W. Y. CHAR,
Their Attorney.

EXHIBIT A

(Copy)

Passport Division
Speedletter

This form of communication is used to expedite consideration of your case. Should a reply be necessary, it should be addressed as follows to insure prompt receipt:

In reply refer to F 130—Young Lum Jip.

Date: October 16, 1951.

Passport Division
Department of State
Washington 25, D. C.

Sau Ung Loo Chan,
Attorney at Law,
P. O. Box 3315,
Honolulu, T. H.

Reference citizenship cases of Young Lum Jip, Young Ah Kwai and Young Ah Chor.

official executives, has refused to issue to Plaintiffs, and each of them, a United States passport or any other travel document upon the ground that they are not nationals of the United States; that the issuance of a United States passport or equivalent document by the Defendant is a right and/or privilege to which each of the Plaintiffs is entitled as a United States citizen; that Defendant's denial of Plaintiffs' passport applications, executed on July 10, 1951, and refusal to afford the Plaintiffs, facilities for the execution of affidavits for the purpose of travelling to the United States is the denial of a right and/or privilege of citizens and/or nationals of the United States upon the ground that the Plaintiffs are not nationals of the United States.

VIII.

That, as a result of the American Consulate's disapproval of Plaintiffs' applications and refusal to issue to Plaintiffs United States passports or equivalent travel documents, Plaintiffs are unable to enter and reside in the United States, and such refusal is a denial of their rights and privileges upon the ground that they are not nationals of the United States.

Wherefore, Plaintiffs pray for judgment and decree adjudging that they are citizens and/or nationals of the United States and as such are entitled to the rights and/or privileges of citizens and/or nationals of the United States, including the right to be issued United States passports and the right to enter and reside in the United States of America.

Dated: Honolulu, T. H., this 12th day of November, 1954.

YOUNG AH KWAI, and
YOUNG AH CHOR,
Plaintiffs;

By /s/ W. Y. CHAR,
Their Attorney.

EXHIBIT A

(Copy)

Passport Division
Speedletter

This form of communication is used to expedite consideration of your case. Should a reply be necessary, it should be addressed as follows to insure prompt receipt:

In reply refer to F 130—Young Lum Jip.

Date: October 16, 1951.

Passport Division
Department of State
Washington 25, D. C.

Sau Ung Loo Chan,
Attorney at Law,
P. O. Box 3315,
Honolulu, T. H.

Reference citizenship cases of Young Lum Jip, Young Ah Kwai and Young Ah Chor.

Department informed by Consulate General at Hong Kong that a travel affidavit was issued to Young Lum Jip on October 11, 1951. His alleged brothers, Young Ah Kwei and Young Ah Chor were refused documentation.

/s/ R. B. SHIPLEY,
Chief, Passport Division.

EXHIBIT B

(Copy)

The Foreign Service of the
United States of America

[Stamped]: Consulate General of United States of America. Nov. 7, 1951. Hong Kong.

American Consulate General,
Hong Kong, October 22, 1951.

Young Ah Kwei,
216 Nam Ping Hotel,
Des Voeux Road,
Hong Kong.

Sir:

With reference to your interview at this Consulate General on August 28 and October 9, 1951, you are informed that you have failed to establish your identity as the son of an American citizen, Young Yick.

The testimony given by you and your witnesses disclosed wide discrepancies regarding material

facts concerning which you and your alleged brothers should have been in agreement, if your claimed relationship had existed in fact.

In view of the foregoing, the passport application executed by you on July 10, 1951, has been disapproved, and the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States.

The facts of your case have been reported to the Department of State, Washington, D. C.

Very truly yours,

For the Consul General:

/s/ H. E. MONTAMAT,
American Consul.

EXHIBIT C

(Copy)

The Foreign Service of the
United States of America

American Consulate General,
Hong Kong, October 22, 1951.

Young Ah Chor,
216 Nam Ping Hotel,
Des Voeux Road,
Hong Kong.

Sir:

With reference to your interview at this Consulate General on August 28 and October 9, 1951, you

are informed that you have failed to establish you identity as the son of an American citizen, Youn Yick.

The testimony given by you and your witnesse disclosed wide discrepancies regarding materia facts concerning which you and your alleged broth ers should have been in agreement, if your claime relationship had existed in fact.

In view of the foregoing, the passport applicatio executed by you on July 10, 1951, has been disap proved, and the Consulate General declines to affor you facilities for the execution of an affidavit fo the purpose of travelling to the United States.

Very truly yours,

For the Consul General:

/s/ H. E. MONTAMAT,
American Consul.

[Endorsed]: Filed November 13, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now John Foster Dulles, Secretary of Stat of the United States of America, by his attorneys Louis B. Blissard, United States Attorney for the District of Hawaii, and Charles B. Dwight III, As sistant United States Attorney for the District of

Hawaii, and moves this Honorable Court to enter judgment on the pleadings in favor of the defendant, as to plaintiff Young Ah Kwai, and to dismiss this cause as to plaintiff Young Ah Kwai for the reason that the plaintiff in his complaint has failed to state a claim against the defendant upon which relief can be granted.

Dated: Honolulu, T. H., this 1st day of April, 1955.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii;

By /s/ CHARLES B. DWIGHT, III,
Asst. United States Attorney, District of Hawaii,
Attorneys for Defendant.

[Title of District Court and Cause.]

NOTICE

To: W. Y. Char, 311 Liberty Bank Building, Honolulu, T. H., Attorney for Plaintiffs:

You are hereby notified that the attached Motion for Judgment on the Pleadings will be heard before the Honorable J. Frank McLaughlin, Judge, United States District Court for the District of Hawaii, in his courtroom in the Federal Building, Honolulu, T. H., on the 13th day of April, 1955, at the hour of

2:00 o'clock on said date, or as soon thereafter as counsel may be heard.

Dated: Honolulu, T. H., this 1st day of April, 1955.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii;

By /s/ CHARLES B. DWIGHT, III,
Asst. United States Attorney, District of Hawaii,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1955.

In the United States District Court
for the District of Hawaii

Civil No. 1110

YOUNG AH KWAI and YOUNG AH CHOR,
Plaintiffs,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,
Defendant.

ORDER AND JUDGMENT

The Motion for Judgment on the Pleadings having come on for hearing on April 27, 1955, the plaintiff, Young Ah Kwai, being represented by W. Y.

Char, Esquire, and the defendant, John Foster Dulles, being represented by Louis B. Blissard, United States Attorney for the District of Hawaii, and Charles B. Dwight III, Assistant United States Attorney for the District of Hawaii, the matter having been fully argued, the Court finds as a matter of law that the plaintiff, Young Ah Kwai, is not now nor has he ever been a citizen or national of the United States;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Motion for Judgment on the Pleadings be and hereby is granted and that Judgment for the defendant, John Foster Dulles, be entered against the plaintiff, Young Ah Kwai.

It Is Further Ordered and Adjudged that this Order and Judgment take effect nunc pro tunc as of April 27, 1955.

Dated: Honolulu, T. H., this 15th day of June, 1955.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Young Ah Kwai, by W. Y. Char, Attorney for plaintiff, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order and judgment entered in this proceeding on April 27, 1955, granting defendant's motion for judgment on the pleadings and the nunc pro tunc order filed on June 15, 1955, granting defendant's motion for judgment on the pleadings.

Dated: Honolulu, T. H., this 17th day of June, 1955.

YOUNG AH KWAI,
Plaintiff;

By /s/ W. Y. CHAR,
His Attorney.

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that Young Ah Kwai, as principal, and Commercial Insurance Company, a corporation duly licensed to carry on business in the Territory of Hawaii, as surety, are

held and firmly bound unto the defendant above named, John Foster Dulles, Secretary of State of the United States of America, hereinafter called the "Appellee" in the sum of Two Hundred Fifty Dollars ($250.00) for the payment of which well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, and firmly by these presents.

The condition of this obligation is such that:

Whereas the above bounden principal has filed his Notice of Appeal from the United States District Court of the District of Hawaii to the United States Court of Appeals for the Ninth Circuit to reverse the final judgment of this court made and entered in the above-entitled cause on the 27th day of April, 1955.

Now, Therefore, if the said principal shall prosecute his appeal with effect and answer all costs if he fail to sustain said appeal, then this obligation shall be void, otherwise it remains in full force and effect.

Sealed with our seal, and dated this 27th day of June, 1955.

/s/ YOUNG AH KWAI,
Principal.

COMMERCIAL INSURANCE COMPANY,

[Seal] By /s/ HAU HEE,
Its Attorney in Fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 25th day of June, A. D. 1955, before me appeared Young Ah Kwai, to me personally known, who being by me duly sworn, did say that he is the principal named in the foregoing Bond on Appeal and that he acknowledged said instrument as his free act and deed.

[Seal] /s/ JEANETTE Y. L. LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: 9/25/57.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 27th day of June, A.D. 1955, before me personally appeared Hau Hee, to me personally known, who being duly sworn did say that he is the Attorney-in-Fact of the Commercial Insurance Company, duly appointed under Power of Attorney dated the 6th day of August, 1937, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors, and

said Hau Hee acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ JEANETTE Y. L. LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: 9/25/57.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

/s/ JON WIIG,
U. S. District Judge.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 28, consists of a statement of the names and addresses of the attorneys of record and of the various pleadings as hereinbelow listed and indicated:

Originals

Amended Complaint.
Motion for Judgment on the Pleadings.

Memorandum of Points and Authorities, and Notice.

Order and Judgment.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit under Rule 73(b).

Bond on Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of July, 1955.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Endorsed]: No. 14,835. United States Court of Appeals for the Ninth Circuit. Young Ah Kwai and Young Ah Chor, Appellants, vs. John Foster Dulles, Secretary of State of the United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed July 16, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 1110

YOUNG AH KWAI and YOUNG AH CHOR,

Plaintiffs-Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Defendant-Appellee.

APPELLANTS' STATEMENT OF POINTS

Plaintiff-Appellant above named, sets forth the following point on which he intends to rely on appeal:

The court erred in ruling that the plaintiff-appellant, Young Ah Kwai, was not a United States citizen at birth, in that he did not satisfy the residence requirement under section 1993 of the Revised Statutes.

Dated: Honolulu, Hawaii, this 29th day of June, 1955.

YOUNG AH KWAI,
Plaintiff-Appellant.

By /s/ W. Y. CHAR,
His Attorney.

[Endorsed]: Filed July 16, 1955.

No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellants' Opening Brief

Appeal from the United States District Court
for the District of Arizona

HERBERT B. FINN
125 West Monroe Street
Phoenix, Arizona

G. W. SHUTE
W. T. ELSING
505 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellants

FILED
FEB 1953
PAUL P. O'BRIEN, CLERK

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellants' Opening Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTIONAL MATTERS

On May 27, 1955 the United States District Court for the District of Arizona, Honorable Dave W. Ling presiding, made its Findings of Fact and Conclusions of Law (T.R. 48) and entered Judgment for the defendant below. (T.R. 52). On June 24, 1955, the plaintiffs below filed their Notice of Appeal (T.R. 53). The lower court, on July 26, 1955, extended the time for filing the record and docketing the appeal to August 17, 1955. It was filed on August 1, 1955 (T.R. 838). The lower court had jurisdiction by virtue of 29 U.S.C. § 216 (Fair Labor Standards Act). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This action was brought to recover unpaid wages by thirty-five women who contend that they were employees of the Salt River Valley Water Users' Association (hereafter referred to as the "Company"), a private corporation. Their husbands were joined as parties. On November 28, 1950 they filed a complaint, which was later amended (T.R. 18). It alleges that for two years prior to the filing of the complaint they were employed by the Company to do clerical work and work pertaining to the sale, distribution and delivery of water, the distribution of water for agricultural and other purposes being one of the functions of the Company. They further alleged that the Company failed to pay them anything for their services. They set up facts to the effect that the Company was subject to compliance with the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 206,[1] which reads:

> "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than 75 cents an hour; * * *" [prior to January 25, 1950 the minimum was 40 cents per hour]

The Company filed an amended answer. It is not printed in the Transcript of Record and so is added to this Brief as Appendix A. Among other matters it alleges that any work or service performed by the women plaintiffs was done without its knowledge, was voluntary, and was performed without expectation of compensation; and denies that the women plaintiffs were its employees.

---

1. The Act of 1938 (52 Stat. 1060) was amended by the Portal-to-Portal Act of 1947 (61 Stat. 84); by the Acts of July 20, 1949, C. 352 and Oct. 26, 1949, C. 352, 63 Stat. 446. The latter amendment took effect as of January 25, 1950.

It raised the issue as to the applicability of the Fair Labor Standards Act but it offered no proof at the trial to the effect that it was exempt from the operation of that Act or that the women plaintiffs were not covered by the Act.

A companion case, *Sturdivant, et al. v. Salt River Valley Users' Association, an Arizona Corporation;* was tried immediately following this case. The records of the two cases are consolidated. It was stipulated that the testimony of the witness Ronald Arden Wright given in the *Sturdivant Case* (T.R. 790 et seq.) would be considered as a part of this case (T.R. 810).

The lower Court held that the women plaintiffs were not employees of the Company and entered judgment accordingly (T.R. 52). Hence, this appeal.

The facts show generally that waters are collected from a 13,000-square-mile water shed; are converged at Granite Reef Dam near Phoenix, Arizona, where they are diverted into canals. From the canals the water flows into laterals and ditches and from them is distributed to the lands of farmers and other users in the Salt River Valley. The water supply from Granite Reef Dam is augmented by pump waters (T.R. 322).

The area in which the water is used was, during the times pertinent to this action, divided into sixty-two divisions. Each division was ordinarily in the charge of a zanjero, who was an employee of the Company (T.R. 63, 318). It was his responsibility to see that the water was delivered to the user in the quantities and at the times the user ordered. He was engaged in the production of goods for interstate commerce (T.R. 86 and see *Reynolds v. Salt River Valley Water Users' Ass'n.*, 9 Cir. 1944, 143 F2d 863).

The women appellants are all wives of zanjeros (T.R. 318). They lived with their husbands in zanjero stations on

their respective divisions (T.R. 63). The specific duties which they performed are described in detail in the argument below.

It will be seen that there is surprisingly little conflict in the evidence. Three witnesses who were married to zanjeros and who are not parties to this action did testify in effect that they were not employees of the Company (T.R. 372, 386, 390). But, of course, that does not contradict the testimony of the parties and other witnesses who testified to facts establishing that these appellants did work for the Company.

To avoid awkward appellations, in this brief the women appellants are referred to as "the wives".

THE ISSUE INVOLVED

The sole issue in the case is whether or not the wives were employees of the Company within the meaning of the Fair Labor Standards Act of 1938, as amended. During the period covered by this action the following definitions from that Act were effective:

Title 29 U.S.C. § 203. As used in this Act—

> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any group of persons.
>
> * * * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

All the specifications of error relate to this fundamental issue and can best be argued as one. It will be shown that the lower Courts' material findings were not supported by any substantial evidence and that in practically every instance, testimony by the Company's own witnesses refute the findings.

SPECIFICATIONS OF ERROR

I.

The Court erred in making the following Conclusions of Law (T.R. 51):

"I.

Defendant did not at any time material herein, suffer or permit plaintiffs to work for it, and, therefore, defendant did not employ plaintiffs."

"II.

In that defendant did not employ plaintiffs, the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A., Sec. 200 [sic], et seq., are not applicable."

These Conclusions of Law are clearly erroneous in that the undisputed evidence shows that the wife-appellants were suffered and permitted to work for appellee and therefore come within the definitions of the Fair Labor Standards Act of 1938 with respect to employees.

II.

The Court erred in making the following Finding of Fact:

"VI.

The zanjero wife, including these women plaintiffs, were not required by defendant to perform any duties

as a condition of their husband's employment. Plaintiffs received no instructions from defendant; and defendant had no policy whereby it requested the zanjero to instruct his wife with respect to duties to be performed by her. Defendant exercised no control over plaintiffs with respect to the manner in which they used their time or with respect to their activities; plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for plaintiffs to notify defendant at any time concerning such departures; some wives, including some plaintiffs, were employed regularly away from the divisions by persons other than defendant with or without the knowledge of defendant, and without objection by the defendant." (T.R. 50)

This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that all the wives were required by the Company to perform work as a condition to their husbands' employment; and that the appellee exercised control over the wives with respect to the time as to when they could leave and return to the zanjero stations.

III.

The Court erred in making the following Finding of Fact:

"VII.

Any work performed by zanjero wives, including plaintiffs, for the benefit of defendant was work performed voluntarily, unknown to the defendant, and not under the direction and control of defendant, but at the request of their husbands. The extent of the assistance of the zanjero wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees. Assistance by the wife

or other members of the family was not necessary for the efficient performance of the zanjero's duties. All such work performed by plaintiffs was work for which the husband was paid by defendant pursuant to the terms and conditions of the collective bargaining agreement between the defendant and the zanjeros." (T.R. 50, 51)

This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that the work that wives performed was required by the very nature of the job of the zanjeros; that the duties of the zanjeros were so planned and devised so that the proper performance of the duties of the zanjeros was impossible without the help of the wives. The evidence clearly proves that the Company required the performance of labor by the wives; that the extent of the work of the wives was controlled not by the zanjeros but by the extent of the duties on the division and by the amount of time that the zanjero spent in the field. There was no evidence that the zanjero was paid for all the work done by his wife nor any evidence of how much the Company paid the zanjero for work performed by his wife.

IV.

The Court erred in entering Judgment for the Company (T.R. 52), for the wives were "employees" under 29 U.S.C. § 206(a), the Company was an "employer" not exempt from complying with that section, and the Company did not pay such employees for actual hours worked by them.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERRORS NUMBERS I TO IV

I. The Wives Performed Services Which Were Indispensable to the Operation of the Company's Business.

The wives did company work. This is not disputed. They all lived at zanjero stations, "as servants and not as tenants"

(T.R. 205), where the Company had telephones, some office equipment, and office files relating to the distribution of water in the zanjeros' respective divisions (T.R. 85). Their tasks consisted of the following: answering business telephone calls. In the busy season there would be from twenty-five to fifty calls a day; in the slack seasons, about ten (T.R. 195, 220).[2] They would also make telephone calls to farmers, other water users, to the Company's head office (T.R. 89, 220), and to the Watermasters who were the zanjero supervisors (T.R. 148). The wives kept various records and filled out various reports such as Town Site reports (T.R. 87), Zanjero Advance Service Cards (T.R. 98, 254), Name and Address Cards; Buy, Legal Description Cards; Continued Run Cards (T.R. 197), Crop Reports showing what crops farmers were growing (T.R. 198), Subdivision Water Schedules, copied lateral reports (T.R. 197) and made out A.V.O.'s, which were memos to the Company concerning matters which the zanjeros were required to communicate, such as structures that needed repairing, laterals that needed cleaning, and so forth. (T.R. 71). They did clerical filing work (T.R. 223), and checked credit balances of water users (T.R. 220). In some instances they worked in the field, turning in water, making farm changes (T.R. 223), operating gates (T.R. 232), and cleaning ditches (T.R. 194). They took orders from farmers who came to their stations (T.R. 86). When there was trouble in a division, such as a flood (T.R. 220), they reported it (T.R. 86).

The wives spent a minimum average of about three hours a day on business telephone calls (T.R. 90); and five hours in keeping records (T.R. 94).[3]

---

2. Generally from the first of the year to March was slack (T.R. 195).

3. Five of the zanjero's wives testified in regard to the tasks they performed. It was stipulated that if the other wives were called, they would testify to substantially the same thing (T.R. 329).

The work that was done by the wives was work which was assigned to the husband-zanjero's division, and work which he could not do because (1) he did not have the time, being engaged on other Company business and (2) because he could not be in the field and at the telephone at the same time (T.R. 194).[4]

II. The Zanjero Could Not Properly Operate His Division Without His Wife's Help.

The zanjeros were in the field working from twelve to eighteen hours a day (T.R. 95, 168, 204). The work which they performed was so time-consuming that they could not do the required jobs performed by their wives. (T.R. 89). Although a company man testified that it was "fifty-fifty", (T.R. 404), a disinterested witness testified that except in a "very few cases" the telephone calls were taken by the wife (T.R. 246). From ninety to ninety-five per cent of the time when a farmer went to a zanjero station, it would be the wife who would take his instructions (T.R. 442).

Without a wife's help, the zanjero could not operate his division (T.R. 252, 445, 460). "You will never be a free woman after you get on that job * * * because your time is the Water Users'" (T.R. 287). The work required two people (T.R. 194). The wife had to help (T.R. 215).

One of the wives testified that because of the necessity of someone being at the station at all times she had to give up church work and had to refuse work in the Parent-Teachers Association (T.R. 223). Another wife said that she had to give up the idea of doing substitute teaching because "it is

4. At the time of the trial, the Company was experimenting with a "zone system". Under it, a zanjero (called waterman) worked eight straight hours. There were three shifts. It took thirty-three men to do the same work as fifteen zanjeros under the old system (T.R. 209). The watermen's cars had radio telephones and was apparently a more efficient mode of operation (T.R. 427).

an understood thing that the zanjero's wife stay at home and answer the phone for their husband and help them in whatever way they can" (T.R. 287). It is true that one wife was a dressmaker. However, her work was done at home with the exception of the times that she left to take fittings. But even then, a lady was hired to remain at the station to take calls (T.R. 154 et seq.). That it took two to run a division is proven by the fact that when the wife of one of the zanjeros died, the Company put an extra zanjero on the division to answer the telephone (T.R. 431, 455).

III. The Company Knew That the Wives Were Doing the Work.

The lower Court found that the Company did not know that the wives worked (T.R. 50). This Finding is absolutely contrary to the evidence. The wives were telephoning the Company's office to check on farmers' credit balances, reporting floodings (T.R. 220), getting correct addresses, and calling about water (T.R. 89). The Company's office would telephone the wives and pass on complaints and orders to them (T.R. 215, 445). The reports sent into the Company were in the handwriting of the wives as well as their husbands (T.R. 251).

The Company attempted to refute this by the testimony of one of its witnesses, who said (T.R. 404): "I have never instructed the wives. I have left instructions with the wife to pass on to the husband * * * telling him when his water would be there or how many inches of water to let through in the canal at a specific time." But this in itself constituted an instruction to the wife. On receiving such a call, she would try to locate the zanjero, would call places where she thought he might be passing (T.R. 173)[5] to have him waved

5. Some of the zanjero stations were on ten-party telephone lines with other industrial users (T.R. 93, 202). Sometimes "you can try as long as an hour" to place a call (T.R. 201).

down (T.R. 186). If the wife were notified by the Company that water was coming to a farmer and the farmer had no telephone, the wife would make the water change herself if her husband was out in the field (T.R. 225).

These activities were not isolated ones. They were not done merely in response to a casual and occasional request for a favor. The Company operated on a twenty-four hour day, seven days a week (T.R. 116, 180, 409, 531). The telephone calls, the making of reports, the information that had to be communicated between the wives and the water users and the wives and the Company obviously went on without ceasing during the entire year.

That the Company knew and expected the wife to work is further established by the following answers of a supervisor (T.R. 120):

> "Q. Is it a rule that somebody must be at the phone [at a zanjero station] at all times?
>
> A. I wouldn't say it is a rule. I would say it is customary.
>
> Q. And by 'somebody', does that necessarily mean the zanjero?
>
> A. Well, it can be the zanjero, zanjero's wife or whoever he designates as somebody competent to receive the calls."

Another supervisor for the Company was asked (T.R. 396):

> "Did you, as a Watermaster, ever advise a zanjero that his wife was required to assist him in connection with his job?
>
> A. No; I have always made it a point to instruct the zanjero and if he wished to push any of that work off on his wife he could instruct her how to do the work.
>
> Q. Do some of them push the work off on their wives?
>
> A. I think so."

For reasons given below, the wives were so imbued with the idea that they had to attend to their zanjero stations they would generally not leave them without Company permission. So, a wife testified in answer to the following question (T.R. 92):

> "Q. * * * Do you recall any time during employment that you left the house for any period of time?
>
> A. Well, yes, I had to leave one time to go to see my mother. She had been ill so Mr. Harper [her husband] called the Association and asked them if it would be all right for me leaving and the Watermaster asked him if there would be someone there to take care of the telephone and he told them yes, that he would have someone to take care of the telephone while I was gone so they told him it would be all right then for me to go.

Another wife testified (T.R. 151):

> "* * * So I asked him [a Watermaster]—I said, 'I have a chance to do some other work. If I have someone here to answer the phone is it all right for me to do other work?'
>
> "He said, 'As long as there is someone here to answer the phone, that is all that is necessary.' I hired a woman * * *"

IV. The Company Required the Wives to Work.

The foregoing, it is submitted, establishes that the wives were working for the Company; the Company knew it; and by implication demanded it as a condition of employment for the zanjeros. There is other forcible evidence.

For example, a witness testified that when he applied for a job, the assistant to the General Superintendent (T.R. 161) "asked me if I was married, if my wife worked and told me she would have to help out by taking telephone

calls and orders, the orders of the farmers that came to the door" (T.R. 248). The same official told another applicant for a zanjero job, "that it was necessary for me to be married in order that my wife might help me with my duties" (T.R. 82). A Watermaster told one of the wives that it was her part to do everything that she could to help her husband in running the division in the way that it should be run (T.R. 151).

The General Superintendent of the Company (T.R. 161) told some of the zanjeros after a meeting:

> "There is a zanjero in Mesa, his wife won't stay at home and answer telephone calls and if she won't stay at home or if he can't get her to stay at home we are going to have to do something about it. We are going to have to let that man go."

It was a policy of the Company to employ only married men as zanjeros (T.R. 82, 83, 214).[6] The Company's reason was that they hired married men because of their greater stability and their willingness to work the irregular hours (T.R. 423). Considering all the testimony, however, it may readily be deduced that the primary reason was so that the Company could have the services of the wives. This can be demonstrated.

The zanjero could not carry on his work without a telephone. So said the Company (T.R. 328). Now, a telephone

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6. The appellants' evidence overwhelmingly proved that it was a *requirement* that the zanjeros be married. A few extracts from the Transcript are: "I was told [by the assistant to the General Superintendent] that I wouldn't be able to go to work until the time that I married" (T.R. 82). "I missed one job because I wasn't married. * * * Another job came up * * * [The General Manager] asked me how long would it take me to get married and I told him not very long, and so we were married on June 29 and I went to work on June 30, '37" (T.R. 215).

without anyone to answer it is equivalent, of course, to no telephone at all.

The Company had mailed cards to all its shareholders requesting them to place their water orders between 7:00 a.m. and 3:00 p.m. (T.R. 176). It was between these hours that the Company believed that most of the zanjeros would be in the field, for it contended that a good zanjero was able to schedule his water for distribution during the day (T.R. 123). It follows that the Company expected the man to be in the field while the woman was in the office. It was unquestionably for that reason that the Company employed only married zanjeros and demanded that their wives remain at the station and work. All this is high-lighted by a good illustration. When one of the wives had a baby, the Company installed a telephone extension by her bedside (T.R. 197).

V. The Evidence Proves That the Wives Were Employees of the Company and Entitled to Be Paid for the Actual Hours That They Worked.

"Work" is distinguished from the physical or mental exertion required to do "something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend or the packing of a trunk for a pleasure trip * * *" *Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123*, 1944, 321 U.S. 590, 64 S. Ct. 698, 88 L.Ed. 949, footnote 11.

No one ever would contend that the zanjero duties performed by the wife were for her pleasure, sport, and so forth. There is no doubt that she "worked". The question is: for whom did she work? Who was her employer? The employer necessarily would have to be either the Company or the wife's husband. Admittedly, the husband derived a bene-

fit from the wife's work. If the wife had not taken telephone calls, for example, it would have driven one of appellee's witnesses "crazy" (T.R. 365). If the wife had not worked, the husband would have lost his job (T.R. 191). But essentially, if the wife did not work, the Company would have had to hire additional help (see the facts under II, above). It must be concluded that the Company was the employer. Even under the common law definition of master and servant, the wives were probably employees of the Company. But the limitations of the common law are not applicable under the definitions of the Fair Labor Standards Act. In *National Labor Relations Board v. Hearst Publications, Inc.*, 1944, 322 U.S. 111, 64 S. Ct. 851, 88 L.Ed. 1170, it is said:

> "Congress, on the one hand was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. *Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common law had worked this out in all its variations*, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region of between what is clearly and unequivocally 'employment' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment."

Although the case just cited involved the National Labor Relations Act, 29 U.S.C. § 151 et seq., the same liberal inter-

pretation required to effectuate the social legislation of the Fair Labor Standards Act applies to the latter. *McComb v. Homeworkers Handicraft Co-op,* 4 Cir., 1949, 176 F2d 633; *Rutherford Food Corporation v. McComb,* 1947, 331 U.S. 722, 67 S. Ct. 1473, 91 L.Ed. 1772.

In the *Homeworkers Case,* the Court said that common law rules as to distinctions between servants and independent contractors throws little light on who are employees within the meaning of the act.

The key words "to suffer and permit" have been the recipients of some attention by the courts in various situations that have arisen under the Fair Labor Standards Act. Thus this Court has held that these words mean work done with the knowledge of the employer. *Fox v. Summit King Mines,* 9 Cir., 1944, 143 Fed. 2d 926. See, also, *Mabee Oil and Gas Co. v. Thomas,* 1945, 195 Okla. 437, 158 Pac. 2d 713, 169 ALR 1318; *Jackson v. Derby Oil Co.,* 1943, 157 Kan. 53, 139 Pac. 2d 146. A more recent District Court decision, *Neal v. Braughton,* D.C. Ark., 1953, 111 Fed. Supp. 775 sums it up as follows:

> "The term 'employee' includes to suffer or permit to work. 29 U.S.C.A. Sec. 203 (g) Walling v. Jacksonville Terminal Company, 5th Circuit, 148 Fed. 2d 768. The words 'to suffer or permit to work' do not mean that permitting someone to work for a third person or worker's own self constitutes a person an employer bound to pay statutory wages. They mean that a person is an employer if he permits another to work for him, though he has not expressly hired or employed him. Walling v. Jacksonville Terminal Company, supra, Walling v. McKay, 70 Fed. Supp. 160, [Aff'd in 8 Cir., 1947, 164 F2d 40] and the words 'suffer' and 'permit' mean with the knowledge or consent of the employer. Fox v. Summit King Mines, 143 Fed. 2d 926, 932;

Mabee Oil & Gas Company v. Thomas, 158 P.2d 713, 169 ALR 1318."

The Company knew that the wives were working. It admittedly never instructed them not to do the work (T.R. 416). It therefore suffered or permitted them to work within the meaning of 29 U.S.C. § 203(g).

CONCLUSION

It is respectfully submitted that the judgment of the lower Court should be reversed with instructions to enter judgment for the wives and for a determination of the issue on whether or not the wives are entitled to liquidated damages and attorneys' fees.

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(Appendix A follows)

APPENDIX A

In the United States District Court
District of Arizona

No. CIV—1551—Phoenix

Faye M. Barras,
Plaintiff,

vs.

Salt River Valley Water Users,
An Arizona Corporation,
Defendant.

AMENDED ANSWER

Defendant, for its amended answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I

Defendant alleges that plaintiff's complaint fails to state a claim upon which relief can be granted, and moves the Court for an order dismissing plaintiff's complaint and action.

II

Answering paragraph I of plaintiff's complaint, defendant denies that the purported action herein is one arising under Section 16(b) of the Fair Labor Standards Act of 1938, as amended, and denies that plaintiff's complaint states a cause of action, and denies that this Court has jurisdiction herein under Title 28 U.S.C.A., Section 41(8), or at all.

III

Answering paragraph II of plaintiff's complaint, defendant admits that defendant is a corporation organized and

existing under the laws of the State of Arizona and in this connection defendant alleges that it is a non-profit water users' association or corporation, that it has no assets, and that its operations are without profit. In this connection defendant alleges that it was organized for, and its principal purpose is and has been to assist in carrying out the purposes of the United States Reclamation Act (43 U.S.C.A. 371 et seq.) in relation to the Salt River Project.

Denies that during the two years next preceding the filing of this action, or at any time, defendant was or is now engaged in interstate commerce as defined by Section 3(b) of the Fair Labor Standards Act, or at all, and denies that defendant has been or is now continuously or otherwise engaged as an employer of labor engaged in the production of goods for commerce as defined in Section 3(j) of the Fair Labor Standards Act, or at all. In this connection defendant denies that, except as agent for Salt River Project Agricultural Improvement and Power District (a district organized under the provisions of Article 7 of Chapter 75 A.C.A. 1939), and not otherwise, it has:

> Maintained or operated dams; power plants; lines for distributing electricity; waterway, flumes, canals, conduits or ditches for the distribution of water; or impounded water for the purpose of producing electrical power or for distributing water for irrigation of land; delivered water to power plants or produced power; purchased power outside the State of Arizona or brought power into the State of Arizona; sold, delivered or distributed electrical power to industries or companies in Arizona; sold, distributed or delivered water to industries or companies in Arizona, or otherwise.

In this connection, defendant alleges that under an Agreement (hereinafter called "Agreement"), between defendant and Salt River Project Agricultural Improvement and Power District, (hereinafter called "District"), made and entered into on the 22nd day of March, 1937, and approved on behalf of the United States of America by the Secretary of the Interior Department of said United States on the 18th day of May, 1937, defendant, as agent for District, and not otherwise, maintained and operated the reservoirs, dams, power plants, electrical distribution systems, waterways, canals, flumes, conduits and ditches for the distribution of water; impounded water principally for irrigation and as an incident thereto, produced electricity, sold and distributed water for irrigation, and sold and delivered power principally for pumping water for irrigation; that all revenues collected or received by defendant, were the property of District, and all amounts not required to be expended for maintenance and operation or retained for necessary reserves, were paid over by defendant to District at the end of each calendar year in accordance with the terms of said Agreement; that the Salt River Project was constructed principally with funds supplied by the United States of America under and pursuant to the Reclamation Act (43 U.S.C.A. 371 et seq.) and said Salt River Project is subject to the terms and provisions of said Reclamation Act; that in excess of $20,000,000 remains unpaid on the construction costs of said Salt River Project;

That by Agreement between defendant and District, dated the 12th day of September, 1949 (hereinafter called "Amended Agreement") approved by the Secretary of Interior under date of the 4th day of October, 1949, said Agreement was amended effective the 1st day of November, 1949; that beginning and since the 1st day of November,

1949, defendant, as agent for District and not otherwise, has operated and maintained the irrigation and drainage system of Salt River Project, as such irrigation and drainage system is described and defined in said Amended Agreement; that a true copy of Agreement and Amended Agreement is attached hereto marked "Exhibit A" and by reference made a part hereof; that beginning with and since the 1st day of November, 1949, defendant has not operated or maintained any project of any character and has not engaged in any activity whatsoever, except the operation and management of said irrigation and drainage system as District's Agent pursuant to the provisions of Amended Agreement.

Further answering said paragraph II, defendant denies that, for itself or as agent for said District or otherwise, defendant generated, produced, purchased, sold, delivered, or distributed any electrical power or energy whatsoever, or has operated or maintained any dams, works, plants, transmission or distribution lines, or any other property or thing related to or connected with the generation, production, sale or distribution of electrical power or energy.

IV

Answering paragraph III of plaintiff's complaint, defendant denies that at any time mentioned in plaintiff's complaint defendant, except as agent for said District and not otherwise, sold, distributed or delivered water to any land in the Salt River Valley in Arizona.

Defendant admits, that as agent for said District, and not otherwise, it has employed zanjeros; denies that it requires said zanjeros to be married or to live in a house furnished by defendant; admits that as agent for said District and not otherwise, defendant furnished telephones for said zan-

jeros; denies that the homes or houses of said zanjeros were or are divisional offices of defendant; denies that defendant required, or now requires, said zanjeros to be available twenty-four hours a day or seven days a week. Denies each and every, all and singular, the allegations set forth in paragraph III of plaintiff's complaint not herein specifically admitted.

V

Answering paragraph V of plaintiff's complaint, defendant admits that the plaintiff, and each complainant, is married; denies that plaintiff, or any of the complainants, is the wife of a person employed by the defendant; denies that plaintiff, or any complainant, was on duty at any house or structure of defendant at any time; denies that plaintiff, or any complainant, made or received telephone calls or performed any work or service for defendant at any time whatsoever; denies each and every, all and singular, the allegations of said paragraph V not herein specifically admitted. In this connection, defendant alleges that if plaintiff, or any complainant, has performed any work or service for defendant, such work or service was performed without the knowledge of defendant, and was voluntary and without expectation of compensation on the part of plaintiff and any of said complainants.

VI

Answering paragraphs VI, VII, VIII, IX and X of plaintiff's complaint, defendant denies that the complainants, or any of them, are or were at any time mentioned in plaintiff's complaint, employees of defendant, and denies that defendant is indebted to complainants, or any of them in any amount.

In this connection defendant alleges that for many years prior to the time specified in plaintiff's complaint, the

method and manner of delivering water for irrigation on the Salt River Project and the duties of the zanjeros in respect thereto were identical with the methods of delivering such water and the zanjeros' duties in respect thereto during the time set forth in plaintiff's complaint; that at no time prior to the filing of the complaint herein has the plaintiff, or any complainant, or the wife of any zanjero, claimed to be an employee of defendant or of District, or claimed the right to any compensation from defendant or District; that defendant and District have at all times acted in good faith and in the honest belief, and now believe, that plaintiff, and each of the complainants, is not an employee of defendant or of District.

VII

Defendant denies each and every, all and singular, the allegations of plaintiff's complaint not hereinbefore specifically admitted.

WHEREFORE, having fully answered, defendant prays to be dismissed with its costs herein incurred and expended.

JENNINGS, STROUSS, SALMON & TRASK
By I. A. JENNINGS
Attorneys for Defendant
619 Title and Trust Bldg.
Phoenix, Arizona

[Filed September 15, 1951]

[Verification]

No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellee's Brief

Appeal from the United States District Court
for the District of Arizona

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No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellee's Brief

Appeal from the United States District Court
for the District of Arizona

STATEMENT OF THE CASE

The statement of Appellants set forth at page 2 of Appellants' opening brief[1] is inadequate. Contrary to the assertion contained therein (Ap. Br. 4) there is a great conflict in the evidence.

This case is unique in the annals of the many hundreds of cases involving the applicability of the Fair Labor Standards Act. There is no case of record similar to it. It is conceded that there was no express agreement of employment between Appellee and any of the Zanjero wives. The usual

1. Appellants' brief will be abbreviated as "Ap. Br."; the Transcript of Record as "T.R." The Appellants will sometimes be referred to as the "Zanjero wives."

indicia of employment is entirely absent. In no instance did a Zanjero wife apply for employment. None were carried on Appellee's payroll. Workmen's Compensation was not carried by Appellee on Zanjero wives, nor were they included in reports to any State or Federal administrative officials having to do with old age benefits, social security and unemployment insurance.

Local 266, International Brotherhood of Electrical Workers, A.F.L., was certified in 1941 by the National Labor Relations Board as the collective bargaining agent of all employees of Appellee. Zanjero wives were not included in any such classification so certified. With the exception of two or three, all Zanjeros were members of the Union (T.R. 339). It was never contended by the Union in its negotiations with the defendant over a period of years that the wives of Zanjeros were employees of defendant, nor was such contention ever made in Union meetings (T.R. 340, 341). The husband of one of the Appellants was President of the Union in 1946 (T.R. 597). The first knowledge Appellee had that some of the Zanjero wives claimed the status of employees coincided with the filing of this action (T.R. 51).

The only issue involved in this case, as a matter of both fact and law, is whether Zanjero wives were employed by Appellee. Asserted employment of Zanjero wives is predicated solely upon and by virtue of their marriage to Zanjeros, who were employed by Appellee in the operation of laterals, ditches and canals used to distribute water to the shareholders of Appellee. These shareholders are scattered throughout an area consisting of approximately 240,000 acres in the Salt River Valley. This area was broken down into approximately 62 zanjero subdivisions, each comprising eight to ten square miles. Each Zanjero performed his duties without direct supervision. His hours of work fluctuated

week by week. Because of the seasonal nature of agriculture, the Zanjero's work week fluctuated radically from the winter months to the summer months. This general method of operation by Appellee and the working conditions common to all Zanjeros provide the basis for the contention of the wives that they were employed. Appellants assert that the operational plan of Appellee was so designed that the Zanjero could not properly operate his division without the help of his wife (Ap. Br. 9), thus making her indispensable to the operation of Appellee's business (Ap. Br. 7). In addition, it is asserted that the Appellee knew the wives were performing work (Ap. Br. 10) and required the wives to work (Ap. Br. 12).

The trial court made express findings of fact which are contrary to the position asserted by Appellants. In summary form, the court below found, *inter alia*, that the wives were not required to work as a condition of their husbands' employment, that assistance by the wife was not necessary for the efficient performance of the Zanjero duties, and that any work performed by the wives for the benefit of Appellee was voluntary and unknown to Appellee (T.R. 50-51). Having made these findings the trial court concluded as a matter of law that Appellee did not employ these Appellants and that, therefore, the provisions of the Act were not applicable. This appeal followed.

The arguments contained in Appellants' opening brief are not specifically directed to the Specifications of Errors.

For the convenience of the Court, this brief will be organized into two parts. The first argument will discuss the findings of fact of the trial court and the evidence in the record in support thereof. The second argument will set forth authorities in support of the lower court's conclusions of law.

I.

ARGUMENT IN SUPPORT OF FINDINGS OF FACT OF THE TRIAL COURT

Specifications of Errors II and III (Ap. Br. 5, 6) assigns as error only paragraphs VI and VII of the lower court's findings of fact. (T.R. 50, 51). For the Court's convenience they are set forth as follows:

"VI.

The Zanjero's wife, including these women Plaintiffs, were not required by defendant to perform any duties as a condition of their husband's employment. Plaintiffs received no instructions from Defendant; and Defendant had no policy whereby it requested the zanjero to instruct his wife with respect to duties to be performed by her. Defendant exercised no control over Plaintiffs with respect to the manner in which they used their time or with respect to their activities; Plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for Plaintiffs to notify Defendant at any time concerning such departures; some wives, including some Plaintiffs, were employed regularly away from the division by persons other than Defendant with or without the knowledge of Defendant, and without objection by the Defendant. (Italics supplied.)

VII.

Any work performed by zanjero wives, including Plaintiffs, for the benefit of Defendant was work performed voluntarily, unknown to the Defendant, and not under the direction and control of Defendant, but at the request of their husbands. The extent of the assistance of the zanjero wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees. *Assistance by the wife or other members of the family was not necessary for*

the efficient performance of the zanjero's duties. All such work performed by plaintiffs was work for which the husband was paid by Defendant pursuant to the terms and conditions of the collective bargaining agreement between the Defendant and the zanjeros." (Italics supplied.)

Although Appellants assign as error these findings in their entirety, their various arguments are directed only at those portions which have been italicized. Having failed to direct the attention of the Court to competent evidence in the record contrary to the remainder of these findings, it must be presumed that they are also conceded.

Have Appellants sustained the burden imposed upon them by showing to this Court that the disputed findings of fact of the lower court are not supported by the evidence?

The first two arguments advanced by Appellants should be treated as one. These arguments suggest that the services performed by the wives were indispensable to the operation of the company's business (Ap. Br. 7) and that the Zanjero could not properly operate his division without his wife's help (Ap. Br. 9). Presumably, the reason why the wife's services were indispensable was because the Zanjero could not do the work by himself.

The first contradictory part of the record with respect to these two arguments is found in paragraph V of the lower court's findings of fact (T.R. 49) which was not assigned as error by Appellants. The lower court made two significant findings therein. First, that while the Zanjero was usually married, the Appellee has employed and is now employing unmarried Zanjeros (See T.R. 160-163; 431). Second, that married Zanjeros were employed because the Zanjero lived in a house on his division miles from populated areas with the result that more stable employment tenure was achieved

among married rather than unmarried Zanjeros. If the Zanjero could not perform his work without the help of a wife, why would the Appellee employ unmarried Zanjeros? Likewise, married Zanjeros were employed, not because the wife had to work, but because they were more stable employees. These unchallenged findings of fact are sufficient in themselves to negate the first two arguments of Appellants. What evidence in the record do Appellants rely upon to support their contention that the challenged findings of fact are "clearly" erroneous?

First, they assert that it is undisputed that the wives did company work. (Ap. Br. 7). The record, however, contains credible evidence to support the finding of the court below that the alleged work performed by the wives was controlled by the husband and was work which "the husband induced the wife to assist him in varying degrees". (Finding of Fact VII, *supra.*) The wives performed work for their husbands, not for Appellee. Thus, one witness testified as follows (T.R. 395):

> "Q. Why do you help your husband this way?
>
> A. I do it because I want to help him. I do it to help him. I am not required to by anybody.
>
> Q. Why must you help your hsuband this way?
>
> A. Well, I just do it because I want to. He likes for me to do that for him because I write better than he does. It isn't that he doesn't have time."[2]

Another witness testified: (T.R. 386)

> "Q. Do you assist your husband in any way in his job as Zanjero?
>
> A. Only occasionally I do make out a few cards if we want to do something in the evening and it leaves him free to do so."

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2. This testimony was elicited upon cross-examination by counsel for Appellants.

Another testified: (T.R. 396-397)

"Q. Did you, as a Watermaster, ever advise a zanjero that his wife was required to assist him in work in connection with his job?

A. No; I have always made it a point to instruct the zanjero that if he wished to push any of that work off on his wife he could instruct her how to do the work?

Q. Do some of them push the work off on their wives?

A. I think so.

Q. Others don't?

A. That is right."

Next, Appellants would have the Court believe that the record supports the statement that Appellants lived at Zanjero stations "as servants and not as tenants" (Ap. Br. 7). Page 205 of the transcript is cited to substantiate the implications inherent in this statement. At this page of the transcript, Exhibit 8 is set forth. It is a memorandum agreement executed between the Zanjero and Appellee concerning the terms under which the Zanjero house was to be occupied. Significantly, no reference is made to the wife, she is not a party to the contract, and under no circumstances could it be construed to classify the wife as a "servant" of Appellee.

The statement that the wives spent a minimum average of three hours a day on telephone calls and five hours keeping records is similarly misleading (Ap. Br. 8). The portion of the transcript cited to support this contention pertained to the personal testimony of one Zanjero wife who was involved in this action. Although the trial court found that the wives did some work at the inducement of the husband, the trial court also found that "in many cases the wife did not in any manner assist the husband in the performance of his duties" (Finding of Fact VII, *supra*). Testimony in

the record supports this finding. One wife testified that she did not do anything in connection with her husband's business (T.R. 372). And how could the wife of the claimant Hendrix in the companion *Sturdivant* cases have done any work for Appellee if she was a full time employee away from the premises?[3] (T.R. 420-421). How could the Appellant Gaddy in this case have done such work while she was a full time employee of the Goodyear Aircraft Company and the Coca Cola Company? (T.R. 448-449). And a witness called by Appellants, a Zanjero claimant in the companion case, testified that he made out all of his own reports (T.R. 216). Who answered the phone and kept the records for the unmarried Zanjero?

Of a similar nature is the cited testimony of one wife involved in this litigation that work was done by the wives because the Zanjero did not have the time and because he could not be in the field and at the phone at the same time (Ap. Br. 194). There is ample evidence in the record to support the finding of fact of the trial court that "assistance by the wife or other members of family was not necessary for the efficient performance of the zanjero's duties" (Finding of Fact VII, *supra*). In this connection, attention is redirected to the testimony of the Zanjero wife quoted above that "it isn't that he doesn't have time" that I help my husband.

The designated separate argument of Appellants (Ap. Br. 9) that the Zanjero could not properly operate his division without his wife's help contradicts the record for the same reasons as set out above. Appellants, however, illustrate their case by reference to a wife who allegedly "had

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3. There are thirty-six claimants in the *Sturdivant* cases. There are only thirty-five wives in this case. The wife of Zanjero Hendrix did not allege she had been employed by Appellee for obvious reasons.

to give up church work and had to refuse work in the Parent-Teachers Association" (Ap. Br. 9; T.R. 223). Appellee directs the attention of this Court to the testimony of another Zanjero wife who was active in church work and who was President of the Maricopa County Parent-Teachers Association (T.R. 372). This same witness testified as follows, when asked what part of the day she engaged in these activities (T.R. 373):

> "Well, we always had an afternoon meeting at our PTA meetings and then we had several dinners that we worked on in afternoons and evenings and in my church work, of course, I went to church on Sunday morning and Sunday evening and Wednesday evenings."

The testimony of the Appellant who admitted to having been employed as a dressmaker was offered to show that a lady was hired to remain at the station to take calls (Ap. Br. 10). Cross-examination of this party developed that the wife had a minor child and that she did none of her own house work (T.R. 156). Was the domestic servant hired to answer the telephone or was she hired to take care of the child and do the cooking, ironing, washing and housework? The answer to this question was settled by the trial court in his findings of fact.

Finally Appellants argue it is proven that it took two to run a division by the fact that when the wife of one of the Zanjeros died, the Company put an extra Zanjero on the division to answer the telephone (Ap. Br. 10). The testimony of an interested Zanjero was cited (T.R. 455). The substance of this testimony is that "off and on" there was either a Zanjero or a Relief Zanjero who answered the phone. No other facts were offered. The time period involved, the number of calls, the source of his knowledge or any other information. Is this the evidence which renders

the findings of fact of the trial court "clearly erroneous"?

The next argument set forth in Appellant's opening brief is that the Appellee knew that the wives were doing the work. (Ap. Br. 10). The argument is prefaced with the remark that the finding of "the lower court * * * that the Company did not know that the wives worked" is "absolutely contrary to the evidence". This, of course, is not a completely accurate statement of the trial court's finding. The finding apparently alluded to reads (Finding of Fact VII, *supra*):

> "Any work performed by zanjero wives, including Plaintiffs, *for the benefit of Defendant* was work performed voluntarily, unknown to the Defendant, and not under the direction and control of Defendant, but at the request of their husbands." (Italics supplied.)

The words in the italics constitute the significant aspect of this finding. Any work performed by these Appellants "for the benefit of Appellee" was unknown to Appellee. Appellee has discussed in a preceding portion of this brief the finding of the lower court that in some cases the husbands induced the wives to assist them in varying degrees, and the evidence in support thereof. The work performed was for the benefit of the husband, not Appellee. That the wives regarded any such work in this light is borne out by the following testimony on cross-examination (T.R. 200):

> "Q. You knew that your husband was being paid for each report made, did you not?
>
> A. I did.
>
> Q. And you knew that he got paid for each report whether by you or by him?
>
> A. That is right.
>
> Q. And also you knew he got paid for the time spent on the telephone, whether by you or by him, is that correct?
>
> A. That is right."

In view of the finding of fact of the lower court in the *Sturdivant* cases that the husbands were not required to work time in excess of the agreed time credits to perform all the work required of them (T.R. 41) it is clear that the work performed by the wives, if any, was work performed for the benefit of the husbands for which the husbands were compensated.

The evidence contained in the record and relied upon by Appellants to support their argument that the Appellee knew that the wives were doing work also proves that any such work was done for the benefit of the husbands and not the Appellee. A watermaster testified,[4] "I have never instructed the wives. I have left instructions with the wife to pass on to the husband." (T.R. 404; See Ap. Br. 10). Another watermaster testified as a witness for Appellants that there was no "rule" that somebody be at the phone at all times (T.R. 120; Ap. Br. 11). This same witness, under further examination by Appellants' counsel, also testified that the work of a Zanjero division could be done without a telephone (T.R. 121). Finally, Appellants cite the testimony of another watermaster as proof that the Appellee had knowledge the wives worked. But, this witness stated that he never advised a Zanjero that his wife was required to assist him in connection with his job. According to the witness, "if he wished to push any of that work off on his wife he could instruct her how to do the work" (T.R. 396; Ap. Br. 11).

It is also strange that Appellants would cite the testimony of the wife whose husband felt compelled to get permission for his wife to leave in order to care for her sick mother

4. Appellants argue that Appellee tried to refute their testimony by the quoted portions of this witness' testimony. An examination of the record will show that this testimony was elicited by counsel for Appellants on cross-examination (T.R. 400-405).

(T.R. 12; Ap. Br. 12). The husband himself testified that he received no instructions concerning such matters when he was employed (T.R. 165). They also attempt to buttress their argument by the testimony of the wife who was informed by a watermaster that she could get outside employment "as long as there is someone here to answer the phone" (T.R. 151; Ap. Br. 12). The trial court would have been entitled to, and apparently did, disregard this testimony in view of other like, but contradictory, evidence in the record. Thus, a Zanjero testified that at the time his wife accepted full time employment away from the company premises two watermasters were there; she asked them if it would in any way jeopardize his job if she went to work and they told her it would not[5] (T.R. 381). The Superintendent of Water Distribution of Appellee testified that he knew that the wife of Zanjero Hendrix, one of the claimants in the *Sturdivant* cases, had full-time employment elsewhere (T.R. 418). Another witness called by Appellants, the Superintendent of Water Transmission, testified that to his knowledge the Zanjeros were not required to keep someone on the telephone (T.R. 601). Another watermaster, a witness called by Appellants, said he knew that two wives had outside employment, but that he never objected and never said anything to the husbands about it (T.R. 132-133).

The evidence cited by Appellants in support of their argument (Ap. Br. 12) that the company required the wives to work fares no better on analysis of the record. This argument contravenes the finding of fact of the trial court that "the Zanjero's wife, including these women Plaintiffs, were

5. One of these watermasters was a witness called by Appellants. He did not deny this conversation (T.R. 116-136). The other watermaster denied that he had ever instructed a Zanjero to hurry up and move into a Zanjero house so that his wife could answer the phone (T.R. 416-417).

not required by defendant to perform any duties as a condition of their husband's employment" (Finding of Fact VI, *supra;* T.R. 50). There is ample evidence in the record to sustain this finding.

To begin with, the evidence discussed hereinabove has bearing on this issue. The employment of unmarried zanjeros, the fact that some zanjero wives held full-time outside employment, and the fact that some wives performed no work at all for their husbands negates the contention of Appellants that the Appellee required the wives to work. Does the evidence cited by Appellants establish that the above finding by the trial court is "clearly erroneous"?

Appellants inadvertently cited the testimony of a Zanjero at page 161 of the transcript (Ap. Br. 12). He testified that an official of the company and he had a "general conversation" concerning his absence from the phone after his wife passed away. The fact not brought out by Appellants was that he worked nine months after his wife died (T.R. 160) and that he voluntarily left the job (T.R. 163). The testimony of two Zanjeros is offered with respect to a conversation they had in 1944 when they were hired to the effect that their wives would have to help out (Ap. Br. 12-13; T.R. 82; 247-248). The conversation was with a Mr. Simmons, who was not living at the time of the trial (T.R. 83) and was therefore unavailable to confirm or deny this alleged conversation. Other such alleged conversations between other Appellants or their husbands were categorically denied by the watermaster who testified[6] (T.R. 398; 406; 416-417). To further illustrate their argument, Appellants

6. There was one exception (T.R. 150-151). A wife testified that watermaster Solverson told her that she was expected to help out. The time and place is not specified. Solverson did not appear at the trial. Appellants offered no evidence that at the time of trial he was still employed by Appellee or otherwise available to testify.

appear to directly quote the General Superintendent (Ap. Br. 13). In reality, the testimony is the recollection of a Zanjero of a conversation that occurred in 1946 (T.R. 190-191).[7] The witness on cross-examination was asked whether anything was ever done about the alleged statement that if the Company cannot get the wife to stay at home the Company would have to let the man go. The witness answered (T.R. 191):

> "There weren't anything done about it any more than Mr. White, I think, went out and talked to him."

When the evidence cited by Appellants is examined in light of the entire record it is obviously inadequate to support the argument that the Appellee required the wives to work. It becomes of even less value in light of the fact that four wives and two Zanjeros testified that they received no instructions from Appellee with respect to the work the wives were expected to perform (T.R. 165; 196; 374; 379; 386; 395). Every watermaster or supervisor who testified stated that they never gave instructions to either the Zanjero or his wife concerning duties that the wife was required to perform (T.R. 396; 406; 416-417; 601).

Based upon the foregoing analysis of the record it is submitted that Appellants have not shown that even those portions of the findings of fact of the trial court which they have argued in their opening brief are "clearly erroneous".

In addition, Appellants do not even pretend that the evidence fails to support other findings of the trial court included in their specifications of errors. These unchallenged findings are highly relevant to any inquiry relating to employment. In summary form, they are (Findings of Fact VI and VII, *supra*):

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7. Appellants' brief refers to page 161 of the transcript; the testimony actually appears at page 191.

1) Defendant exercised no control over Plaintiffs with respect to the manner in which they used their time or with respect to their activities.
2) Plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for Plaintiffs to notify Defendant at any time concerning such departures.
3) Some wives, including some Plaintiffs, were employed regularly away from the divisions by persons other than Defendant with or without the knowledge of Defendant, and without objection by the Defendant.
4) Any work performed by zanjero wives, including Plaintiffs, * * * was work performed * * * not under the direction and control of Defendant.
5) The extent of the assistance of the Zanjero's wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees.
6) All such work performed by plaintiffs was work for which the husband was paid by Defendant pursuant to the terms and conditions of the collective bargaining agreement between the Defendant and the zanjeros.

Appellee, on the other hand, has provided this Court with reference to the evidence which supports each of the foregoing findings of the trial court,—findings which, though assigned as error, Appellants have ignored in their brief. The inescapable conclusion is that they were ignored because the record does not contradict them.

In the Statement of the Case, Appellants say:

> "It will be seen that there is surprisingly little conflict in the evidence. Three witnesses who were married to Zanjeros and who are not parties to this action did testify in effect that they were not employees of the Company (T.R. 372, 386, 390). *But, of course, that does not contradict the testimony of the parties and other witnesses who testified to facts establishing that these appellants did work for the Company.*"

This thought is not pursued in the argument. The statement has a deceptive quality of truth. To prove that one "employee" did not work ordinarily would not be evidence that another employee did not work. The situation here is quite different. Appellants, in the lower court, undertook to prove that they were employees. They endeavored to do so by attempting to establish that the plan of operation of Appellee was so designed that it was necessary for the wife to assist the husband in the performance of his duties; that

> "This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that the work that wives performed was required by the very nature of the job of the zanjeros; that the duties of the zanjeros were so planned and devised so that the proper performance of the duties of the zanjeros was impossible without the help of the wives." (Ap. Br. 7)

and again

> "This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that all the wives were required by the Company to perform work as a condition to their husbands' employment;" (Ap. Br. 6)

Appellants' case is grounded upon these propositions. Hence, proof that other Zanjeros' wives did not assist the husband in the performance of his duties, that the husband

had ample time to do all of the work himself; that she felt at liberty to and did come and go as she pleased, attended her church and performed civic duties as other women do, evidence that some Zanjeros' wives held full-time jobs away from home—all is positive evidence contradicting the basis upon which the alleged relationship of employer and employee is founded.

The finding of fact of the trial judge in the case tried without a jury may not be set aside on appeal unless clearly erroneous. Rule 52 (a), Rules of Civil Procedure, 28 U.S.C.A., following section 723 c. The findings of fact of the trial judge are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of evidence or induced by an erroneous view of the law. *Smith v. Porter,* 142 F.2d 292 (8 Cir., 1944). And, the power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. *Cleo Syrup Corp. v. Coca Cola Co.,* 139 F.2d 416 (8 Cir., 1944).

How has this and other Courts applied the law to a problem of this kind under the Act?

II.

ARGUMENT IN SUPPORT OF THE CONCLUSIONS OF LAW OF THE TRIAL COURT

The trial court made two conclusions of law. (T.R. 51). They are:

> "I.
>
> Defendant did not at any time material herein suffer or permit Plaintiffs to work for it, and, therefore, Defendant did not employ Plaintiffs.
>
> II.
>
> In that Defendant did not employ Plaintiffs, the provisions of the Fair Labor Standards Act of 1938, as

amended, 29 U.S.C.A., Sec. 200, et seq., are not applicable."

Appellants have specified them both as error.

The cardinal principle in the employer-employee relationship is the right of the employer to direct and control the employee in the performance of assigned duties and the obligation of the employee to perform those duties in the directed manner. This rule was stated in *Fruco Const. Co. v. McClelland*, 192 F.2d 241 (8 Cir., 1951), which involved an interpretation of the Fair Labor Standards Act. Therein the Court said (192 F.2d, at page 244):

> "The essential characteristics of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed."

Although this act defines the term "employ" to include "to suffer or permit to work" (29 U.S.C.A. § 203 (g)), it has not been given the broad meaning which these words would otherwise imply. At an early date in the interpretation of this Act, the Sixth Circuit Court in *Walling v. Sanders*, 136 F.2d 78 (1943), at page 81, used this language:

> "In so broadly defining the word 'employer' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment."

The issue involved in this case was whether truck drivers were employees of salesmen or of the defendant-employer. The following language would seem to be pertinent to the facts of this case (136 F.2d at page 81):

> "The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

The Act, then, was not intended to bring within its provisions persons who in the ordinary and common sense understanding of the terms are not employees. It was designed to afford persons who are actually employees the protection of the Act and the benefits of its wage and overtime provisions. This principle is succinctly stated in *Bowman v. Pace,* 119 F.2d 858 (5 Cir., 1941), at page 860:

> "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act."

To the same effect, see: *Dugas v. Nashua Mfg. Co.*, 62 F. Supp. 846, 849 (1945); *Maddox v. Jones*, 42 F. Supp. 35, 41 (1941); *Walling v. American Needlecrafts*, 46 F. Supp. 16 (1942).

Nor is the Act intended to include persons who do some work upon the premises of an employer without expectation of compensation. *Walling v. Portland Terminal Co.*, 155 F.2d 215 (1 Cir., 1946), 330 U.S. 148, 57 S. Ct. 639. Nor does it include persons who performed some service even with the knowledge of the employer who do so under circumstances deemed voluntary. *Rogers v. Schenkel*, 162 F.2d 596 (2 Cir., 1947).

At the very outset of this brief on behalf of Appellee, the statement was made that this case was unique in the annals of the reported cases construing this Act. All of the authorities cited above, and in Appellants' brief as well, involved situations where the issue was the extent to which employment was covered by the Act, not a case such as this where the question is whether there was any employment

at all. This is not a case where the only impediment to Appellants was the failure to prove a written contract of employment. This is a case where for the first time the contention of employment was raised in the allegations of a complaint filed in the court below. Leaving aside the findings of fact of the trial court which conclusively establish that no such employment existed, this is a bold attempt to establish an employer-employee relationship when, by their conduct for many years, the parties had never contemplated that one existed.

But there are findings of fact of the court below supported by the overwhelming weight of the evidence. Based upon the evidence before it, the lower court refused to create a new wage liability for Appellee where none had existed before. In so refusing, the trial court was correct, as a matter of law, that at any time material herein Appellee did not suffer or permit Appellants to work for it, and, therefore, Appellee did not employ Appellants.

III.

CONCLUSION

It is respectfully submitted that, based upon the evidence and the record considered as a whole, the reasons and authorities hereinbefore set forth, the judgment of the lower court should be affirmed and that this appeal should be dismissed.

JENNINGS, STROUSS, SALMON & TRASK
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Phoenix, Arizona

Attorneys for Appellee

No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

LEO STURDIVANT, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellants' Reply Brief

Appeal from the United States District Court
for the District of Arizona

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Attorneys for Appellants

FILED

APR 20 1956

PAUL P. O'BRIEN, CLERK

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

LEO STURDIVANT, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellants' Reply Brief

Appeal from the United States District Court
for the District of Arizona

There are several evidentiary inaccuracies contained in the brief of Appellee which should be considered by the Court.

I.

The brief states (pp. 3-4) that the Trial Court found the Appellants were not employed to work 24 hours a day 7 days a week. This is only found by inference in the Judgment of the Court, to-wit,

> "* * * the time credits agreed upon and as set forth in Appendix 'A' bear a substantially acurate relationship

> to the actual time required by Plaintiffs to perform all the work required of them in that Plaintiffs were not required to work in excess of said agreed credits to perform all the work required." (TR 40-41)

Despite Appellants' contentions this finding is clearly erroneous in that there is no evidence to support it in the transcript. The only evidence in the transcript is to the contrary, that is, that the time credits were artificial and bore no relationship to the actual time worked, and this was testified to at numerous times (See: TR 189, 201, 274, 436, 469, 569, 596).

So artificial was this time unit system that one of the witnesses for the Appellants testified that he was "docked" 11 and 9/10ths hours for working over 24 hours a day (TR 203). As a matter of fact the company's attorney phrased it correctly:

> "Q. As a matter of fact there are only certain operations for which you were given actual time?" (TR 244)

Even the company witnesses nowhere state that the time units bore a substantially accurate relationship to all the work done or the actual work done. The closest to it was Frank Richard Hill's testimony,

> "A. All things being equal, if the water was there, the only way you could change a head of water if the water would be there, if the water was in the lateral and the zanjero knew his business as a regular zanjero, I believe that the time was adequate." (TR 340)

Later on, the same witness answered the question:

> "Q. Mr. Hill, how long did it take to make a lateral change?
>
> A. Well, it all would depend on how much water you were picking up. * * * " (TR 367)

The Court consistently ruled out evidence with respect to this matter (See TR 201, 473, 474, 200, 468).

The Court further finds

> "The work performed by plaintiffs for which they were compensated as hereinabove found constituted all the work performed by Plaintiffs for Defendants." (TR 41).

This is clearly erroneous in that again there is no evidence to support this finding. The Opening Brief of Appellants discusses this matter in detail (TR 20-27). It is interesting that during the long pre-trial maneuvers and during the actual trial the Trial Court repeatedly refused to consider the time units and to consider the contention of the Appellants that the time units were inaccurate and artificial. The Judge's ruling on this matter apparently at the time of the trial was that the plaintiffs are bound by a contract and that that ends the matter.

Appellee states in its Brief (page 31) that the weight of the evidence tends to show that as a matter of practice the zanjero performs his work during the day-light hours most days of the year and quotes certain witnesses. The witnesses whose evidence was cited were witnesses for the Appellee with two exceptions.

Thus Appellee John W. Smith was present during 2 days of the trial. However, it could be pointed out that this is not during the period of time covered by this action (See, TR 594). In the matter of the other company witnesses, a very small and incomplete portion of their testimony is cited; thus James Patterson, a supervisor, called by Appellants, testified:

> "Q. It is the policy of the company that the zanjero do most of his field work during the daytime?
>
> A. No; * * *" (TR 124)

"Q. In the summertime, let's say, in the month of May or June, do you know how many hours about on the average, a zanjero would have to spend out in the field?

A. Well, each division is a little different. I have one fellow that has been busy for 2 or 3 days during the week. I mean by that he will pick up his water at midnight. He is in a congested area and he will run, then, for 3 or 4 days when he gets his board completed. Then he will have some free time." (TR 122)

"Q. Do you know or are you familiar with the policy of the phone company with respect to phone calls coming in at night as to whether the zanjero should or should not answer them?

A. Well, the zanjero is subject to call 24 hours a day and it is my supposition that naturally when it rings he should answer it." (TR 123)

Frank Hill did admit that he did some of the many changes noted in his field book at nights, but that contrary to the rules of the company, he also permitted farmers to make their own changes at night.

"Some of those changes I made at night, a lot of them were shut off by farmers and a lot of them I was running waste water coming from the desert and they would put down the gate, the farmer would." (TR 816)

John Ruth's testimony was completely impeached in the closing pages of the transcript. As a matter of fact, Mr. Ruth was directly examined by the counsel for appellee concerning his testimony about not working at night.

"Q. Did you ever receive any complaints from the Water Users with respect to the manner in which you are operating your Division?

A. I did.

Q. You did?

A. Yes, sir." (TR 828)

One of the Appellants testifying with respect to the Division operated by Mr. Hill, and after stating that he had operated the Division between 4 and 6 weeks, stated:

"Q. Were you able to finish your work during the daylight hours of that division?

A. No, sir. We got quite a bit of our water late at night * * *" (TR 444)

A careful reading of the testimony of the witnesses reveals certain astonishing matters; thus Ida Phillips testified in support of Appellee's position:

"Q. How many hours would your husband work on that day, do you know?

A. Well, he was busy nearly all the time on that.

Q. What do you mean by all the time—16 hours a day?

A. Oh, no; not that much; at least 12.

Q. When would he start and when would he stop?

A. Oh, well, I was just counting the actual time he put in on the job. He got up in the morning about 5:30 and he sometimes didn't get to bed until about 10:00 on that Division." (TR 392-393).

Ezra L. Vines and E. L. Wilson also gave similar testimony (TR 403, 410, 416). As a matter of fact Wilson admits that the Association operated 24 hours a day, 7 days a week and that the zanjeros were responsible for their division 24 hours a day.

In short, the transcript shows that the Appellee's defense was that the Appellants signed and were bound by a collective bargaining contract, regardless of whether or not the contract provided them with compensation for all hours worked or all work done. Appellee offered no evidence to show that the time unit system was arrived at by any actual time study. Appellants' efforts failed to elicit any evidence

as to what the basis of the time unit system was, and there was no evidence supplied by Appellee which shows that the time unit system represented actual time worked in any case.

Therefore, the only testimony in the record is that which proved the artificiality and inaccuracy of the time unit system.

The lower court tried this case on the theory that all evidence indicating that the time unit system did not cover actual hours worked was immaterial and such testimony as may be in the record on the subject was brought out by indirection.

The lower court made the finding of fact that there was substantial relationship between the pay plan and hours worked despite the fact that there was no evidence supporting this finding and despite the fact that it time and again refused to permit the Appellants to introduce evidence on this subject.

II.

With respect to the issue of liquidated damages and good faith, Appellee indulged in an astounding effort to complete a record which is devoid of evidence of good faith. The two letters which are appended to Appellee's brief were never introduced into evidence, never submitted to cross examination and counsel for Appellants were completely unaware of them until the "post trial" brief was submitted by Appellee. It might be pointed out that the letters themselves constitute an admission that Appellee was subject to the Fair Labor Standards Act until January 25, 1950. Indeed in view of the previous decision of this Court in the matter of *Reynolds v. Salt River Valley Water Users,* Civ. 9, 1954, 143 Fed. 2d 863, it can hardly do otherwise.

And the letter of counsel for Appellee to the general manager of Appellee, which is submitted in the Appellee's brief, despite stating that they believe that the situation might be possibly exempt, does state that the Act should be complied with.

In addition to the attempt of counsel to introduce into evidence letters which do not appear in the record, counsel cites numerous cases where the Courts did not award liquidated damages because of the advice of counsel. Actually this Court upheld a trial court in such a decision (See, *General Electric Company v. Porter,* 9 Cir., 1953, 208 F.2d 805). However, the Court should observe that in that case the attorneys for the company established in the evidence that a diligent, careful and prolonged research was made of the problem. There is in the actual evidence in this case nothing to so indicate. This case seems to be identical with *Rothman v. Publicker Industries, Inc.,* 3 Cir., 1953, 201 Fed. 2d 618, where the Court said:

> "The Appellant did not even attempt to meet that burden. Certainly in a case where an employer predicated a change in overtime compensation rates upon so small a change in job description as was the case here, it was not incumbent upon the Court to seek out some exculpatory rationalization of the employer's conduct."

Since the evidence clearly indicates that the company at all times used a misleading title for its pay sheets involving the Belo Plan it would seem almost impossible to construct or infer any action of the company to show good faith (TR 509).

It is respectfully submitted that the Judgment in the Lower Court should be reversed as prayed for in appellant's opening brief.

Respectfully submitted,

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No. 14863

United States
Court of Appeals
For the Ninth Circuit.

UNITED PRESS ASSOCIATIONS, a Corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES and PATRICIA CHARLES and the PIONEER PRINTING COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

FILED
JAN - 3 1956
PAUL P. O'BRIEN, Clerk

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-18-55

No. 14863

United States
Court of Appeals
For the Ninth Circuit.

UNITED PRESS ASSOCIATIONS, a Corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES and PATRICIA CHARLES and the PIONEER PRINTING COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-18-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska.

In the District Court for the District of Alaska,
Division Number One, at Juneau

Civil Action No. 7031-A

UNITED PRESS ASSOCIATIONS, a Corporation,

Plaintiff,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES and PATRICIA CHARLES, and the PIONEER PRINTING COMPANY, a Corporation,

Defendants.

COMPLAINT

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located in New York City, New York, and is engaged in the business of accumulating and disseminating news reports via automatic teletype, telegraph, telephone and other agencies, to a large number of radio stations and newspapers throughout the United States.

2. Defendant Sidney Dean Charles was, on or about June 30, 1945, the editor and publisher of the Alaska Fishing News at Ketchikan, Alaska, a newspaper owned by a partnership called the Alaska Fishing News consisting of Sidney Dean Charles, Paul S. Charles and Patricia Charles as partners. Defendant Pioneer Printing Company, Inc., is an

Alaska corporation, incorporated on or about April 12, 1948, and is the owner and publisher of the Ketchikan Daily News of Ketchikan, Alaska, this newspaper being the successor to the Alaska Fishing News.

3. Plaintiff says that the complaint is for money due under a contract in writing.

4. On or about June 30, 1945, plaintiff and defendant Sidney Dean Charles (the latter on behalf of the said partnership, the Alaska Fishing News) entered into a certain agreement in writing by the terms and conditions of which plaintiff agreed to furnish its Regular News Report to defendants for use in publishing defendants' newspaper for a term of three years beginning September 1, 1945, for which news service defendants agreed to pay plaintiff the sum of $38.17 per week, payable weekly in advance. Subsequent to the date of the execution of said agreement, certain modifications thereto were made by mutual agreement between the parties thereto, and pursuant to paragraph Second of said agreement certain rate increases were made. Such agreement, the modifications thereof and all written documents pertaining to such modifications and such rate increases are attached hereto, marked Exhibit A and made a part hereof. By virtue of the renewal provisions of paragraph Eighth of said agreement and the said modifications contained in Exhibit A, the term of said agreement, as so modified, was extended to continue until September 27,

1962. The documents comprising Exhibit A are hereinafter referred to as the "said agreement."

5. Plaintiff says that it has at all times duly performed all the terms and conditions of said agreement on its part to be performed and that at all times it was ready, willing and able to complete performance of said agreement, and to comply with all the terms and conditions thereof, but has been prevented from so doing by the wrongful and willful failure and refusal of defendants to pay for said news services and to carry out and perform their part of said agreement, although requested to do so by plaintiff.

6. Defendants accepted and paid for a portion of said news service supplied to them by plaintiff under the terms of said agreement, but on or about February 14, 1954, repudiated said agreement.

7. By reason of such wrongful and willful breach by defendants of the terms of said agreement, plaintiff has been and is now prevented from delivering and furnishing said news service to defendants for the entire term of said agreement, and plaintiff says that it would have, but for such wrongful and willful breach by defendants, been entitled to receive a profit of $21,489.57, representing the difference between the aggregate amount plaintiff would have been entitled to receive under said agreement and the costs to plaintiff of furnishing said news service to defendants during the term thereof.

8. Defendant Pioneer Printing Company, Inc has incurred joint and several liability, along wit the other defendants, for plaintiff's claim herei by reason of the former's acceptance of a portio of said news service supplied to it by plaintiff.

Wherefore, plaintiff demands judgment agains the defendants Sidney Dean Charles, Paul S Charles, Patricia Charles and the Pioneer Printin Company, Inc., jointly and severally, in the sum o $21,489.57, together with interest at the rate of si per cent per annum on each unpaid weekly install ment on the date that it would have become due, an together with the costs of this suit and an attorney' fee for plaintiff.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

EXHIBIT A

Agreement

Made this Thirtieth day of June, 1945, at Nev York, N. Y., between the United Press Associ ations, a New York Corporation, hereinafte called United Press, and The Alaska Fishin News, a copartnership hereinafter called th Publisher.

Witnesseth:

That for an in consideration of the sum of On Dollar, each to the other in hand paid, the receip

whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto have mutually agreed as follows:

First.

United Press hereby bargains and sells to the Publisher the right and privilege of publishing in the The Alaska Fishing News, a newspaper printed in the English Language at Ketchikan, Alaska, its regular news Report, and agrees as far as practicable to deliver to the Publisher such news Report by radio-teletype for one hour daily on each of the six regular publication days each week.

Said News Report shall be filed to the Publisher at Seattle, Washington, or elswhere if United Press so elect.

Second.

The Publisher agrees to provide typewriter and any necessary quarters for wire and operator or printer-telegraph machines, and any necessary wire, installation and power required for operation of printer-telegraph machines, and agrees to receive and accept said news Report and pay without deduction to United Press, at its New York office, during the term of this agreement and any extension thereof, the sum of $38.17 (thirty-eight dollars and seventeen cents) per week, weekly in advance, Provided, (1) that United Press shall not be required to furnish such Report on Sundays or later than 12 o'clock Noon on Christmas or Fourth of July; (2) that if the Telegraph or Telephone Company to which tolls

are paid on behalf of the Publisher by United Press, raises the tolls on said news Report or increases the rental rate on printer-telegraph machine equipment supplied by them; or if the wage scale for union employees is increased, said Publisher shall also pay the increases in such tolls, rental or union wages to the United Press; (3) that if said news Report or any wire or other facilities used in the transmission thereof shall be hereafter made subject to any Federal or State tax of any kind payable either directly or indirectly by United Press, the Publisher shall reimburse United Press for the proportion thereof, as determined by United Press, properly applicable to said news Report; (4) that in case of a war or any other extraordinary event requiring an additional or extraordinary expenditure of $500.00 or more weekly by United Press in securing and delivering the news of the same, United Press may assess and the Publisher shall pay United Press an additional weekly sum not to exceed 25% of the Publisher's regular weekly payment for a period coincident with said extraordinary expenditure by United Press.

Third.

The Publisher agrees not to furnish, or permit to be furnished, by his employees or from his office any portion of the United Press Report, or any news tips therefrom, to any other person, corporation, publication or publisher, or make any other use thereof than in the above-mentioned newspaper, without the written consent of United Press, and

further agrees to respect all release pledges on advance matter and to carry copyright line on all copyrighted matter, and to carry the United Press credit line wherever it appears in the service copy.

Fourth.

The Publisher agrees to furnish to United Press at the office of the Publisher all the local news and special service from tributary news territory collected by the Publisher, without cost to United Press.

Fifth.

It is mutually agreed that United Press reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news Report to any other party or parties.

Sixth.

It is further mutually agreed that United Press shall in no event be liable for any loss or damage arising to the Publisher by reason of the publication of any of the news received by the Publisher from United Press.

Seventh.

This agreement is made subject to the ability of wire companies to furnish facilities, and the continuance of intermediate clients now on the circuit, unless United Press is satisfied with the rate named in this agreement, or same can be mutually readjusted.

Eighth.

This agreement shall continue for three (3) years from September 1, 1945, and shall thereafter renew itself continuously for periods of five (5) years unless either party notify the other by registered letter received at least six months before the beginning of the first renewal period or any subsequent renewal period, of its desire to terminate this agreement, in which event this agreement shall terminate at the begining of the next renewal period which would have commenced thereafter; otherwise, it shall remain in full force and effect, subject to all the terms and conditions hereof. In the event of the sale, transfer or consolidation of the aforesaid newspaper property of the Publisher, the Publisher hereby guarantees that his successor or assignee will fulfill the terms and conditions herein contained for the full life of this agreement.

Ninth.

It is further mutually understood and agreed that time, both as to delivery of said news Report and as to said weekly payments, is of the essence of this agreement; that a waiver of any breach shall not be construed to effect a waiver of any future breach of this agreement.

Tenth.

This written agreement comprises the entire understanding of the parties hereto on the subject matter herein contained; any and all oral representations

or agreements of any agent of either party hereto shall be null, void and of no effect whatsoever.

Eleventh.

It is mutually understood that the rate named in said agreement includes a war assessment of 15 per cent now in general effect, but that upon general discontinuance of said war assessment no reduction shall accrue to Publisher thereunder.

Twelfth.

It is mutually understood that the September 1, 1945, starting date for six-days-per-week is contingent upon commencement of daily publications by the Publisher upon that date; and should daily publication not start upon that date, terms of this agreement shall be held in abeyance until such daily publication is started by the Publisher.

Thirteenth.

Executed and accepted by United Press upon understanding that attached letter dated August 9, 1945, and its provisions become part hereof.

Actually started Svce. 10/3/45.

UNITED PRESS
ASSOCIATIONS,

By EDWIN MOSS WILLIAMS,
Vice-President.

THE ALASKA FISHING
NEWS,

By SIDNEY DEAN CHARLES,
Editor and Publisher.

Signed and Delivered in the Presence of:

CARL B. MOLANDER,
As to U. P. A.

MURRAY M. MOLER,
As to Publisher.

August 9, 1945.

Mr. Sidney D. Charles,
Editor and Publisher,
The Alaska Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

In the interim between negotiation of the United Press agreement between Mr. Moler and yourself and its arrival in New York a development in our relations with the Commercial Telegraphers' Union has made it imposible for us to accept the agreement in its present form.

The development is insistence by the Union that a full-time man be provided to operate the Alaska circuit. Since the circuit, at least at the start. will require only an hour a day of operating and since our rate to you was based on an operating cost of one hour a day, we naturally could not afford to pay an operator for eight hours work while in turn being paid by you for the one hour actually performed.

We are hopeful of getting more Alaskan business and thus have more income to pay operating costs;

and that your paper as a daily will grow so rapidly that you will require more than an hour a day of copy. We are willing to undergo the operating loss involved in this situation for six months during which time we will make every effort to secure additional Alaskan business and thus eliminate the loss.

Since you desire to start teletype service as soon as possible, we are sending herewith your executed copy of the agreement between us, subject to the understanding that it is modified by the stipulation that at the end of six months from the date of start of service United Press may increase the rate by an amount sufficient to pay the actual operator's salary cost and that if the amount of this increase is not satisfactory to you that you may change the service to any amount of tolls collect DPR you desire, not to exceed 3600 words daily.

This will also confirm the understanding that the service mentioned in Clause One of the agreement shall consist of one hour of teletype service daily from Seattle over facilities of the Army Signal Corps, tolls to be paid by the publisher and the teletype to be furnished by United Press; that a teletype machine will be installed as soon as possible and service started on the basis of one hour of service on each of the three days per week on which the Alaska Fishing News is published. Such service will continue on a thrice weekly basis until the Alaska Fishing News Begins daily publication at

which time all terms of the agreement will become effective. For the thrice weekly service the publisher will pay the United Press the sum of $32.17 weekly and also pay the Signal Corps tolls.

If this is satisfactory to you, please signify your acceptance by signing the enclosed carbon of this letter and air mailing it to us?

With all good wishes, we are,

Sincerely yours,

EDWIN MOSS WILLIAMS.

EMW:IR
Accepted: The Alaska Fishing News.

Alaska Fishing News
Ketchikan, Alaska.

Ketchikan, Alaska
September 8, 1945

Mr. Dan Bowerman,
United Press Associations
San Francisco Bureau,
814 Mission Street,
San Francisco, California

Dear Mr. Bowerman:

Replying to your letter of September 4, regarding teletype and wire service.

We undestand from your letter that we may take the teletype service, at a cost of $38.17 a week for

hour, 6 days a week, and that we are to pay the lls. We further understand that during the first months of this service, you will pay the Seattle elegraph operator, and that at the end of 6 months, we decided to continue the teletype service, we ould pay this operator's salary, at $52.50 per week.

In other words, we understand from your letter at at the end of 6 months, we may return to our resent service on a daily basis at $20.00 a week us tolls, or continue with the teletype at $38.17 a eek, plus tolls, plus telegraph operator's salary.

On this basis, we would like to have the service arted by teletype at as early a date as possible.

Yours very truly,

SID D. CHARLES,
Editor.

Daily Fishing News
Ketchikan, Alaska

October 12, 1946.

Ir. Dan Bowerman,
nited Press Associations,
14 Mission St.,
an Francisco, California.

ear Mr. Bowerman:

Thank you for your letter of October 9 regarding eletype service. We greatly appreciate your fine

cooperation in offering to share the operator ex
pense, bringing our part of that expense down t
$25.00 per week. On that basis we will continue th
teletype service, and hope that you will be able t
line up new patrons in Alaska.

The service is fine in most respects, however,
have suggested to the Seattle office that they giv
us more short dispatches, particularly those wit
an Alaska slant first, northwest second, and na
tional and international news third. Of course o
any big news, we want full coverage.

We greatly fear a possible shortage of newsprin
next year, as our circulation continues to grow, an
ask that should you learn of any available suppl
of 52″ roll newsprint, you advise us at once.

Thank you for your cooperation.

Yours very truly,

THE DAILY ALASKA
FISHING NEWS,

SID D. CHARLES,
Editor.

Ketchikan, Alaska, Fishing News

Effective January 6th, 1946, total basic rate in
creased by $1.15 per week account operator's in
crease. This to be applied against 1 hour 6 da
printer.

Effective December 29th, 1946, total basic rate ıcreased by $3.05 per week account operator's in-ease. This to be applied against 1 hour 6 day ptr.

Operators Increase—January 4th, 1948—$3.09. his applied against 1 hr. 6 day Ptr.

Operators Increase—January 9th, 1949—$2.06. his applied against 1 hr. 6 day ptr.

Extraordinary Cost Assessment—Effective Jan. 7, 951, $4.75 per week.

Labor Increase—May 5, 1953—$4.18. This applied gainst 1 hr. 6 day Ptr.

Modification of Agreement

New York, February 21, 1950.

With reference to the agreement between United ress Associations and The Alaska Fishing News or United Press news service to The Alaska Fish-ıg News at Ketchikan, Alaska (now known as The Ketchikan Daily News) it is mutually agreed that:

1. The rate mentioned in Clause II thereof is ıspended by mutual agreement starting February 9, 1950, and the rate during such suspension shall e $52.52 per week.

2. This suspension may be terminated by either arty at any time upon thirty days' notice and the eekly rate would then return to the present figure f $72.52 per week.

3. The term of the agreement between the par-

ties shall be extended by the length of time during which the above suspension is in effect.

UNITED PRESS
ASSOCIATIONS,

By JACK BISCO,
Vice-President.

THE ALASKA FISHING
NEW,

By SID D. CHARLES.

[Endorsed]: Filed April 23, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Come now the defendants above-named, and in answer to plaintiff's complaint, admit, deny and allege as follows:

1. Defendants admit the allegations contained in paragraph 1 of the complaint.

2. Defendants admit the allegations contained in paragraph 2

3. Referring to the allegations contained in paragraph 3, defendants admit that plaintiff is seeking a money judgment in this action.

4. Referring to the allegations contained in paragraph 4, the defendants deny that the agree-

ment referred to therein was extended until September 27, 1962, and they admit the remaining allegations contained in paragraph 4.

5. Defendants deny each and every allegation contained in paragraph 5.

6. Defendants admit the allegations contained in paragraph 6.

7. Referring to the allegations contained in paragraph 7, the defendants admit that they have discontinued the news service of the plaintiff, and deny each and every other allegation contained in paragraph 7.

8. Defendants deny the allegations contained in paragraph 8.

For further and separate affirmative defenses to plaintiff's complaint, the defendants allege as follows:

First Affirmative Defense

That the plaintiff has not qualified to do business in the Territory of Alaska, and had not so qualified at any of the times mentioned in the complaint and it is not now qualified and is not entitled to bring or maintain this action; that it has not filed its articles of incorporation, financial statement or annual reports required by law. It has paid no corporation taxes, income, or license taxes, although it was doing business in Alaska at all times mentioned in the pleadings.

Second Affirmative Defense

1. Defendants allege that on or about June 30 1945, The Alaska Fishing News, by Sidney Dear Charles, editor and publisher, signed the contract and the other papers attached to plaintiff's complaint marked "Exhibit A," and in return therefor plaintiff agreed to furnish The Alaska Fishing News, a newspaper published at Ketchikan, Alaska with its regular news reports and agreed, as far as practicable, to deliver to the publisher such news reports by radio-teletype for one hour daily on each of six regular publication days each week, and that the term "regular news report" has a well-defined meaning and it meant that plaintiff would furnish to The Alaska Fishing News an adequate news service covering all news of national importance regularly published in Alaskan papers, and that the price to be paid therefor was $38.17 a week.

2. That the rate set forth in the contract, Exhibit A, was increased from time to time by the plaintiff and The Alaska Fishing News was obliged to pay and did pay in full all increases over the contract price, in order to obtain such news service as the plaintiff was furnishing it from time to time.

3. That plaintiff did not furnish an adequate news service and did not furnish the defendants with the news service contemplated and agreed upon to be furnished by the contract, Exhibit A, and because of that fact the defendants were unable to give to the public the ordinary regular news from outside the vicinity of Ketchikan, Alaska, and they were

nable to compete in this regard with other papers ublished in the City of Ketchikan.

4. That plaintiff repeatedly agreed to improve ts service and to furnish such service as was con-emplated by the contract or agreement to be fur-ished by it, and it advanced from time to time arious promises of improvement and promises to omply with the terms of the contract, accompanied y excuses for not having furnished adequate serv-ce, but it did not at any time during the life of the ontract furnish the service agreed to be furnished.

Third Affirmative Defense

As a third affirmative defense, defendants allege:

1. Defendants reallege all the allegations con-ained in the second affirmative defense hereinabove et forth, and further allege as follows:

2. That on or about April 12, 1948, the above-amed defendant Pioneer Printing Company, was ncorporated as an Alaskan corporation and it pur-hased the property, newspaper and all the rights f The Alaska Fishing News, and it thereupon hanged the name of the paper to the Ketchikan Daily News.

3. That the Ketchikan Daily News, while a suc-essor of the Alaska Fishing News, is not the same aper and the owner thereof, namely the Pioneer Printing Company, a corporation, is owned and ontrolled by its stockholders, and while the defend-nts Sidney Dean Charles, Paul S. Charles and

Patricia Charles are stockholders in the Pione
Printing Company, a corporation, they are not t
only stockholders and others own stock in that co
poration, and the Pioner Printing Company, a co
poration, has never at any time agreed to the tern
and conditions of the contract between The Alas
Fishing News and the United Press Associations s
forth in plaintiff's complaint as Exhibit A, a
while it continued to take the service of the Unit
Press, such as it was, until February 14, 1954,
never at any time agreed to be bound by the tern
of the contract and agreement set up as Exhibit
to the complaint.

4. The Pioneer Printing Company, a corpor
tion, paid for such service as it received from t
United Press at the rates charged by the Unit
Press until February 14, 1954, when it discontinue
that service, having paid in full for all services r
ceived from plaintiff, and it was at no time bou
by any agreement to continue taking any servi
from the United Press, the plaintiff herein, and tha
the Pioneer Printing Company is not indebted
plaintiff in any sum whatsoever.

COUNTERCLAIM

For a counterclaim to plaintiff's complaint, t
defendants allege as follows:

1. That after the discontinuance of the Unit
Press service to the Pioneer Printing Company,
corporation, and between February 15, 1954, a
March 22, 1954, certain demand drafts were sent

Miners and Merchants Bank of Ketchikan, aska, for payment by Pioneer Printing Company, d these drafts amounted to $368.70 and they were dvertently paid and charged to the account of oneer Printing Company and plaintiff received proceeds thereof, and therefore plaintiff is in- ted to the defendant Pioneer Printing Company the sum of $368.70.

Wherefore, defendants pray that plaintiff's com- int be dismissed and that defendants have and over from plaintiff their costs and disbursements ein including a reasonable attorneys' fee, and t the defendant Pioneer Printing Company re- er from the plaintiff the sum of $368.70 together h interest thereon from March 22, 1954, until id.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 15, 1954.

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itle of District Court and Cause.]

PLAINTIFF'S REPLY

In reply to the counterclaim contained in defend- ts' answer, plaintiff admits all of the material egations contained therein with the exception of

the allegation that "plaintiff is indebted to the de fendant Pioneer Printing Company in the sum o $368.70."

Dated: June 4, 1954.

/s/ JOHN H. DIMOND,
Plaintiff's Attorney.

Receipt of Copy attached.

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

REQUEST FOR JURY TRIAL

Comes now the defendants by their attorneys an move the Court to grant defendants a jury trial o the above-entitled cause.

This motion is based upon Subdivision (a) o Rule 38 and Subdivision (b) of Rule 39 of th Federal Rules of Civil Procedure.

Dated at Juneau, Alaska, August 3, 1954.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 5, 1954.

Title of District Court and Cause.]

Minutes of Friday, Sept. 24, 1954

This case came on before the court for hearing on Motion to Transfer to Ketchikan for trial and on Motion for Jury Trial. John H. Dimond appeared or plaintiff and H. L. Faulkner for defendants. After hearing counsel, the motion for transfer was ranted and the motion for a jury trial was denied.

Title of District Court and Cause.]

ORDER

Since the denial on September 24, 1954, of the efendants' motion for a jury trial, editorials have ppeared in the defendants' newspaper in defense f the judge of this court from attacks by Warren aylor. I feel that in these circumstances I should ot be the trier of the issues of fact in the foregoing ase, and hence it is

Ordered, sua sponte, under Rule 39, F.R.C.P., that ie case be tried by a jury.

Dated at Ketchikan, Alaska, April 12, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

You are accepted as jurors in reliance upon your answers to the questions asked you concerning your qualifications. You are just as much bound by those answers now and until you are finally discharged from further consideration of this case as you were then. The oath taken by you obligates you to well and truly try this case and a true verdict render according to the law and the evidence, without allowing yourselves to be swayed by passions, sympathy, or prejudice or like emotion.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

This is a civil suit in which the plaintiff, engaged in the business of gathering and disseminating news to radio stations and newspapers, seeks to recover damages in the sum of $21,489.57 allegedly sustained as a result of an alleged breach of its contract with the defendants.

The complaint alleges that on or about June 30, 1945, the defendant Sidney Dean Charles was the editor and publisher of the Alaska Fishing News, at Ketchikan, a newspaper owned by a partnership consisting of the individual defendants; that the defendant Pioneer Publishing Co., Inc., was incorporated on or about April 12, 1948, and is the owner and publisher of the Ketchikan Daily News, successor to the Alaska Fishing News; that on or about

June 30, 1945, the plaintiff and the defendant Sidney Dean Charles, acting on behalf of the Alaska Fishing News, entered into a contract under which the plaintiff agreed to furnish news to the defendants, which was renewed and extended to September 27, 1962; that although the plaintiff performed all the terms and conditions required of it the defendants, on or about February 14, 1954, repudiated said contract and prevented the plaintiff from further performing, as a result of which the plaintiff lost profits it would have earned amounting to the sum sued for.

By their answer the defendants deny that the contract was extended to September 27, 1962; that the plaintiff performed the terms and conditions required of it; that the defendants wrongfully and wilfully refused to pay for the news furnished or to perform their part of the contract, and also deny that they repudiated the contract although admitting that they have discontinued accepting news from the plaintiff. The denial of these allegations of the complaint by the defendants casts upon the plaintiff the burden of proving them by a preponderance of the evidence.

By way of affirmative defenses the defendants allege that by said contract the plaintiff undertook to furnish to the Alaska Fishing News an adequate news service covering all news of national importance regularly published in Alaskan papers; that although the rate agreed to be paid was increased from time to time by the plaintiff, it failed to furnish an adequate news service as agreed, as a consequence of which the defendants were unable to compete

with other papers, and that notwithstanding the promises of the plaintiff to improve its service, it failed to do so. It is further alleged that the Pioneer Printing Co., although it accepted the news which the plaintiff continued to supply until February 14, 1954, and paid therefor in full, never agreed to the terms and conditions of the contract. The denial of these allegations by the plaintiff throws the burden of proving them by a preponderance of the evidence upon the defendants.

The answer also sets forth a counterclaim against the plaintiff for $368.70, which is admitted by the plaintiff.

It will thus be noted that the plaintiff contends that the defendants, on or about February 14, 1954, breached the contract by refusing to accept its news, whereas the defendants contend that for a long time prior thereto the plaintiff had failed to furnish the news which it had agreed to furnish, and thereby breached the contract. The first question for your decision, therefore, is whether the plaintiff or the defendants breached the contract.

No. 3

The burden is on the plaintiff of proving its allegation that the defendants breached the contract; that it was damaged by reason of loss of profits, and the amount thereof. Conversely, the burden of proving the defendants' allegation that the plaintiff breached the contract is on the defendants.

No. 4

You are instructed that one who has been wrongfully deprived of the profits that he would have earned under a contract may recover as an equivalent or by way of damages the amount he would have earned and been entitled to recover on performance of his part of the contract less the amount it would have cost him to perform the contract. Therefore, if you find that the defendants wrongfully breached the contract, you may allow the plaintiff damages from February 15, 1954, to September 27, 1957, for the amount plaintiff would have earned during that period, less the amount it would have cost the plaintiff to perform its part of the contract, and less $368.70, the amount of the defendants' counterclaim, which is admitted by the plaintiff. In this connection your attention is directed to the fact that although the plaintiff claims damages for the period ending September 27, 1962, the Court instructs you as a matter of law that the term of the contract would expire five years earlier, to wit, September 27, 1957. Since this diminishes the period for which damages are claimed by the plaintiff by five years, the amount sued for would be diminished accordingly. You should bear this in mind in fixing the amount of damages, if you find that the plaintiff is entitled to recover damages.

In determining the amount of damages, if you find the plaintiff is entitled thereto, you may consider the rates in effect and the net profits at the time of the breach, the probability of change dur-

g the period referred to in the rates, the cost of
oing business, and the margin of profit as well
s the probability or improbability that the defend-
nts would remain in business. On the other hand,
you find from a preponderance of the evidence that
ne plaintiff failed to furnish the defendants with
ne news agreed upon, then you would be warranted
finding that the defendants were justified in
escinding the contract and your verdict should be
or the defendants. The defendants contend that
ews of local importance was frequently omitted
rom that transmitted to them, which prejudiced
nem in the operation of their newspaper business
nd in competing with the rival newspaper. If you
nd that such news was omitted from time to time,
nd that in omitting such news the plaintiff failed
o supply the news it had contracted to supply, you
ould be warranted in finding that the defendants
ere justified in rescinding the contract, and that
ne plaintiff was not entitled to recover damages.
n determining whether the defendants were justi-
ed in rescinding the contract, you should consider
ne evidence relating to the omission of news, con-
dered in conjunction with all the other evidence
n the case.

No. 5

You are also instructed, as a matter of law, that
ne corporate and individual defendants have, by
neir acts and conduct, adopted the contract between
ne plaintiff and the Alaska Fishing News and are
ound by it just as though they had originally ex-
cuted it.

No. 6

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, if you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

No. 7

The opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 8

You are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each. You must receive and consider the testimony of each witness in the light of all the evidence, applying thereto the law as given to you in these instructions. You have a right to determine, from the appearance of the witnesses on the stand, from their manner of testifying, from their apparent candor and fairness, from their interest or lack of interest, if any, in the result of this case, from their apparent intelligence or lack of intelligence, and from all the other facts and circumstances proved on the trial, which witnesses are the more worthy of belief.

No. 9

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

You must not allow sympathy or prejudice to influence your verdict.

No. 10

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

No. 11

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits, and two forms of verdict, which are self-explanatory.

If you agree upon a verdict during court hours, that is, between 9 a.m. and 5 p.m., you should have your foreman date and sign it and then return it immediately into open court in the presence of the

ıtire jury, together with the exhibits and these ıstructions, and the unused form of verdict. If owever, you do not agree upon a verdict during ourt hours, the verdict, after being similarly dated ıd signed, must be sealed in the envelope accomanying these instructions. The foreman will then eep it in his possession unopened and the jury ay separate and go to their homes, but all of you ust be in the jury box when the court next conenes at 10 a.m., when the verdict will be received rom you in the usual way.

Given at Ketchikan, Alaska, this 14th day of pril, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

[Title of District Court and Cause.]

VERDICT NUMBER ONE

We, the jury, duly impanelled and sworn to try ıe above-entitled cause, find for the plaintiff, and ssess his damages in the sum of $368.70, less 368.70, the amount claimed by the defendants in ıeir counter-claim.

Dated at Ketchikan, Alaska, this 14th day of pril, 1955.

/s/ CHAS. M. MARLER,
Foreman.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

VERDICT NUMBER TWO

We, the jury, duly impanelled and sworn to try the above-entitled cause, find for the defendants and, further, that they are entitled to recover $368.70 on their counter-claim.

Dated at Ketchikan, Alaska, this ..... day of April, 1955.

....., Foreman.

[Title of District Court and Cause.]

MINUTES OF THURSDAY, APRIL 21, 1955

This case was called up by counsel of record for entry of Judgment and settlement of costs; both were present. The Court heard counsel following which it was ruled that from the Verdict it was apparent that the jury did not intend to award anything to either party and that being the case, each party should pay its own costs.

Thereupon court was adjourned until tomorrow morning at 10 o'clock.

In the United States District Court for the District of Alaska, Division Number One, at Ketchikan

No. 7031-A

UNITED PRESS ASSOCIATIONS, a Corporation,

Plaintiff,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES, and PIONEER PRINTING COMPANY, a Corporation,

Defendants.

JUDGMENT

This cause having come on regularly for trial on April 13, 1955, before the Court and a jury impanelled to try the cause, on the complaint of plaintiff and the answer and counterclaim of defendants, and plaintiff's reply thereto, and plaintiff being represented by its attorney, John H. Dimond, and the defendants by their attorney, H. L. Faulkner, of Faulkner, Banfield & Boochever, and evidence having been adduced before the Court and jury on the issues raised by the pleadings of both parties and trial of the case having been concluded on April 14, 1955, and the jury having retired at 5:00 o'clock p.m., on that date to consider of its verdict, and having returned into court on April 15, 1955, at 10:00 o'clock a.m., with its verdict, which is in words and figures as follows, to wit:

"We, the jury, duly impanelled and sworn to try the above-entitled cause, find for the plaintiff, and assess his damages in the sum of $368.70, less $368.70, the amount claimed by the defendants in their counter-claim.

"Dated at Ketchikan, Alaska, this 14th day of April, 1955.

"CHAS. M. MARLER,
"Foreman."

which verdict was received in Open Court and read by the Clerk of the Court in the presence of the jury.

It Is Therefore Hereby Ordered and Adjudged:

1. That the plaintiff take nothing by its complaint, in which it demanded the sum of $21,489.57 from the defendants, and

2. That defendants take nothing by their counter-claim in the sum of $368.70, and

It Is Further Ordered that neither party recover costs or disbursements or any attorney's fee herein.

Done in Open Court this 22nd day of April, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

MOTION

Under Rule 59, Federal Rules of Civil Procedure—

1. Plaintiff moves the court to set aside and open the judgment entered herein on April 22, 1955, and pursuant to provisions of Rule 52, to make its findings of fact and conclusions of law and direct the entry of a new judgment.

The reasons for this motion are that the court erred in ordering that this case be tried by a jury, and such error can be avoided or corrected by the action of the court in either treating the jury's verdict as advisory or ignoring it entirely and making its own independent findings of fact, conclusions of law and judgment.

2. If the court should deny the relief sought in paragraph 1 of this motion, then in order to avoid a waiver of the right to demand a new trial within the ten days prescribed by Rule 59 (b), plaintiff now moves the court for a new trial upon the following grounds:

(a) The court erred in entering its order of April 12, 1955, in which a trial by the jury was ordered. The right to a jury trial in this action had been waived by defendants, and Rule 39(b) does not give the court the right or the authority, sua sponte, to order a jury trial where there has been such a waiver.

(b) The court erred in giving to the jury i
Instruction No. 4.

(c) The jury's verdict, so far as the amou
of damages awarded plaintiff is concerned, is gross
inadequate. The weight of the evidence in this cas
which was uncontradicted, shows conclusively th
there were some substantial damages, and the ve
dict shows that the jury simply ignored the eviden
in this case.

(d) The verdict, so far as the amount of dar
ages awarded plaintiff is concerned, is contrary
the law and the evidence.

3. Plaintiff moves the court to open and s
aside the judgment entered herein on April 22, 195
and to direct entry of judgment for plaintiff in th
amount of $21,489.57, together with plaintiff's cos
and attorneys' fees.

The reason for this motion is that (a) the cou
erred as a matter of law in holding that the co
tract between plaintiff and defendant was extende
by its terms to only September 27, 1957, whereas, i
fact and as a matter of law, the term of the co
tract had been extended to September 27, 1962; ar
(b) the evidence shows clearly that there is no gen
ine factual issue as to the amount of plaintiff's r
coverable damages, which are, as plaintiff has a
leged in his complaint and has proved, $21,489.5
and therefore, the court, under Rule 56, may ord
that judgment be ordered for plaintiff in tha
amount.

Dated at Juneau, Alaska, this 23rd day of April, 1955.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 25, 1955.

[Title of District Court and Cause.]

MINUTES OF THURSDAY, MAY 20, 1955

At this time the court ruled that plaintiff's Motion to vacate the judgment or grant a new trial would be denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is given that United Press Associations, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 22, 1955.

Dated: June 10, 1955.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The above-named plaintiff, United Press Associ tions, as principal, and the United States Fideli & Guaranty Company, a Maryland corporation, surety, jointly and severally acknowledge that th and their successors and assigns are jointly and se erally bound unto the above-named defendants the sum of $250.00.

The condition of this bond is as follows:

Whereas, the plaintiff, United Press Associatio has appealed to the United States Court of Appe for the Ninth Circuit from the final judgment e tered in this action on April 22, 1955;

Now, Therefore, if the said plaintiff, United Pr Associations, shall prosecute its appeal to effect a pay all costs that may be adjudged against it if t appeal is dismissed or if the judgment is affirm then this bond shall be void; otherwise, to be a remain in full force and effect.

Dated at Juneau, Alaska, this 21st day of Ju 1955.

UNITED PRESS
ASSOCIATIONS,

By /s/ JOHN H. DIMOND,
Attorney for United Press
Associations.

[Seal] UNITED STATES FIDELITY & GUARANTY CO.,

By /s/ R. E. ROBERTSON,
Agent and Attorney in Fact.

Executed in the presence of:

/s/ EILEEN ROBERSON,

/s/ MARTHA SWEET.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

ORDER

Upon consideration of the stipulation, dated June 16, 1955, between the attorneys for the respective parties to this action, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in this action in the United States Court of Appeals for the Ninth Circuit is extended to and including September 1, 1955.

Dated at Anchorage, Alaska, this 20th day of June, 1955.

/s/ J. L. McCARRY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered June 20, 1955.

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated and agreed between Jo
Dimond, attorney for the plaintiff-appellant a
Faulkner, Banfield & Boochever, attorneys for
fendants-appellees in the above-mentioned case, th
in transmitting the record on appeal to the Unit
States Court of Appeals for the Ninth Circuit, t
Clerk of the above-entitled court shall send
original exhibits for the reason that they are
many in number it would be impractical to ma
copies of all of them.

It is further stipulated that there be included
the record on appeal all interrogatories, requests f
admissions and answers to interrogatories and
quests.

Dated at Juneau, Alaska, July 7, 1955.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,
Of Attorneys for Defendan
Appellees.

[Endorsed]: Filed July 8, 1955.

[Title of District Court and Cause.]

STIPULATION

It is stipulated between the undersigned as follows:

1. That the following portions of the record on appeal in this cause may be considered in original form by the United States Court of Appeals for the Ninth Circuit without being printed in the printed transcript of record:

a. Plaintiff's Exhibits Nos. 4, 6, 7 and 8.

b. Defendants' Exhibits Nos. A, B, C, D, E, F, H, and I, and defendants' Exhibit G with the exception of that portion consisting of a letter, dated November 14, 1953, from M. J. Flood to United Press Associations.

2. That in printing the record to be used in the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except from the first page of the record, and that there shall be inserted in place of such titles on all papers used as part of such record the words: "Title of District Court and Cause"; and that all endorsements on such papers used as part of such record may be omitted except the Clerk's filing marks and admissions of service.

Dated: August 16, 1955.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-
Appellees.

[Endorsed]: Filed August 16, 1955.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 7031-A

UNITED PRESS ASSOCIATIONS, a Corpo
tion,

Plaintiff,

vs.

SIDNEY DEAN CHARLES, PAUL
CHARLES, PATRICIA CHARLES, and t
PIONEER PRINTING COMPANY, a C
poration,

Defendants.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 24th day of Se
tember, 1954, court having convened at 9:30 o'clo
a.m., at Juneau, Alaska, the above-entitled cau
came on for hearing on a motion for a jury trial; t
Honorable George W. Folta, United States Distri
Judge, presiding; the plaintiff appearing by Jol
H. Dimond, its attorney; the defendants appearin

by H. L. Faulkner, their attorney; arguments on the motion were made by respective counsel; and the Court made the following statement:

The Court: I was just going to remark that questions of this kind have arisen a great many times in Anchorage, and Judge Dimond, for a year or so after the Rules went into effect, was very indulgent in exercising the discretion vested in him under Rule 39, but he finally wrote an opinion in which he [1*] declined thereafter, except for good reason, to grant a jury trial where there was a failure to demand it within ten days, and that has been the consistent practice ever since, and I have not only followed that practice but have made decisions of that kind or ruled in accordance therewith before Judge Dimond wrote his opinion, and I feel that uniformity of decision demands that this motion be denied.

Thereafter, on the 12th day of April, 1955, court having convened at 2:00 o'clock p.m., at Ketchikan, Alaska, the above-entitled cause came on for hearing; the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by John H. Dimond, its attorney; the defendants appearing by H. L. Faulkner, their attorney; and the following proceedings were had:

Mr. Dimond: If the Court please, in the case of the United Press against Charles, No. 7031-A, the Court will recall in September of 1954, the defendants' counsel moved for a jury trial, having waived a jury trial by failure to file a request within ten

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

days, and after argument the Court denied the r
quest, and, presumably, although no reasons we
stated, the denial was upon the ground or for t
reason that either the case was particularly triab
by the Court and should not be for the jury or el
that the Court simply decided that once a waiv
had been made no further relief in that way wou
be granted just on the simple request. [2]

Now, I have been informed since I came to Kete
ikan, that a jury list has been called for tomorro
for this case. It is the first notice that plaintiff h
received of this, and I want to object to the Court
determination that this case should be tried by
jury in view of the fact that the Court in Septe
ber made a definite and particular decision th
there would be no jury.

I have prepared the case for the plaintiff in t
last few months and particularly the last few wee
on the theory that there would be no jury, and
think the Court is aware of the fact that to a ce
tain extent the manner of preparation and prese
tation is different when a jury is called and wh
one is not. I am particularly concerned about
because I have two or three witnesses, which
thought were important in this case, whose depos
tions I took, and I would not have taken the depos
tions if I had known there would be a jury trial.
think it would have been much to the plaintiff's a
vantage to have these people here personally. I tal
it it would make no difference as far as the Cou
is concerned, but as far as the jury in concerne
if they can size up the witness and hear him talk,

makes a big difference, from reading the dry words of the deposition.

I would like to refer the Court to the case of Hargrove against American Central Insurance Company in 125 Federal Second at Pages 225 and 228. The Tenth Circuit Court [3] of Appeals in 1942 rendered a decision on this point and held that the Court under Rule 39 (b) does not have the right to order a jury trial on its own initiative when there has been a waiver by one of the parties unless upon a motion by the party.

Now, the motion has been made. It was made last September but was denied, unless the Court considers a motion right at this moment. I think this case is authority for the proposition that the Court does not have the discretion in this case to order the trial by jury. At least without the definite and specific motion by one of the parties that a motion be made at this late date, I certainly want to raise an objection to it because it is a renewal of a motion that was made a long time ago and we have been lulled into the feeling that there would be no jury trial and have prepared our case accordingly, and I think this is asking too much of the plaintiff under these conditions to have a trial by jury, and I would like to request the Court respectfully that the Court change its opinion on the matter that it took up yesterday and not have a jury trial for this case which is starting tomorrow morning.

The Court: Do you wish to be heard?

Mr. Faulkner: No. It is a matter of indifference to me, your Honor, but I think counsel is mistaken,

though, about the procedure. I applied for a ju
trial last September, and the Court decided t
Court would try the case, and I made no furth
application. I made no motion to the Court for
jury [4] trial at this time. I certainly wouldn't ha
done that without giving Mr. Dimond notice, a
I assumed that there wouldn't be any jury.

But my understanding of the matter is, althou
the Court hasn't expressed his opinion, but my u
derstanding is that the Court is proceeding und
Rule 39 (b), which gives the Court the right to c
a jury in its own discretion, and I assumed that w
the procedure that your Honor was taking.
doesn't make any difference to us.

The Court: Well, the Court intended to and w
enter an order reciting the reasons for proceedi
under Rule 39. I think that developments, subs
quent to the occurrence that counsel for the plaint
refers to, justify the action taken by the Court
its own motion. Just to make the record comple
the Court will enter an order to that effect.

Mr. Faulkner: If the Court please, I would li
at this time to ask leave to interline in the Fi
Affirmative Defense on Page 2 of the Answer a
other sentence. I think the allegation is sufficie
but that First Affirmative Defense is: "That t
plaintiff has not qualified to do business in the T
ritory of Alaska, and had not so qualified at a
of the times mentioned in the complaint and it is
now qualified and is not entitled to bring or mai
tain this action; that it has not filed its articles

incorporation, financial statement or annual reports required by law." Now, I thought perhaps [5] it would make that a little more definite if we added to that, these words: "It has paid no corporation taxes, income, or license taxes, although it was doing business in Alaska at all times mentioned in the pleadings." Do you have any objection to that?

Mr. Dimond: I have no objection, your Honor.

Mr. Faulkner: It doesn't add much to it, but it makes it more definite.

The Court: It may be amended, then.

Thereafter, on the 13th day of April, 1955, court having convened at 10:00 o'clock a.m., at Ketchikan, Alaska, the above-entitled cause came on for trial before a jury; the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by John H. Dimond, its attorney; the defendants appearing by H. L. Faulkner, their attorney; a jury was duly empanelled and sworn to try the cause; respective counsel agreed that should it become necessary to excuse any member of the jury during the trial of this case they would proceed with less than twelve jurors; opening statements were made by respective counsel; the jury was duly admonished by the Court, and thereupon court was recessed for five minutes, reconvening as per recess with all parties present as heretofore, and the jury all present in the box; whereupon the following proceedings were had:

The Court: You may proceed. [6]

Plaintiff's Case

DAVID F. BELNAP

called as a witness on behalf of the plaintiff, bei first duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Will you please state your name and addres

A. I am David F. Belnap of Seattle, Washin ton.

Q. By whom are you employed?

A. The United Press Associations.

Q. The plaintiff in this case? A. Yes, si

Q. And what are your duties in this emplo ment?

A. I am the Northwest Manager for the Unit Press.

Q. What does that encompass, Mr. Belnap?

A. I am in charge of the business of the Unit Press in the State of Washington, Northern Idah Montana and Alaska.

Q. And it is your duties to be in charge of a responsible for contracts for news reports dealin with Alaska publishers? A. That is corre

Q. You are the one who is responsible for tho reports that are sent to Alaska; is that true?

A. Yes, sir.

Q. How long have you been employed by t United Press in the Seattle office? [7]

A. Since December, 1952.

Q. In the same capacity that you are now?

A. Yes, sir.

(Testimony of David F. Belnap.)

Q. What previous positions, if any, have you held with your present employer?

A. Previous to December, 1952, I was manager for the United Press in the Central Pacific, with headquarters in Honolulu, Hawaii. Previous to that I was manager for United Press in the State of Montana. I was prior to that employed as the Washington State political editor for the United Press with headquarters at Olympia, Washington. I was previous to that headquartered at Spokane, Washington, as bureau manager for United Press, and prior to that I was employed by the United Press at Salt Lake City.

Q. Have you had any other experience in newspaper or news gathering business, besides with United Press?

A. Yes, sir. For a brief time I was employed on the Ogden, Utah, Standard Examiner as a reporter and subsequently as a copy reader, and I was for two and a half years assistant city editor on the old Seattle Star.

Q. And how many years in all have you been engaged in newspaper or news gathering business?

A. About fourteen years.

Q. Have you ever edited news for publication in papers? [8] A. Yes, I have.

Q. How much experience have you had in that respect?

A. I, as I say, was assistant city editor of the Seattle Star for the period of two and a half years.

(Testimony of David F. Belnap.)

during which time I edited city news for the Seattl Star.

Q. And then your experience with the Unite Press has been mostly in transmission of news?

A. That is correct; gathering and transmissio of news.

Q. Will you explain to the jury, Mr. Belnap, jus what this United Press Associations is, what it doe and briefly so they will get the picture of what th U.P.A. means?

A. Yes. United Press Associations is an organi zation of news correspondents, editors, photograph ers, telegraphers. It is a world-wide organizatio and its business is to collect news and sell that new to radio stations, newspapers, television station magazines, and other media whose legitimate func tion, either in whole or in part, is to supply news t the public. We have offices around the world. Thes offices are all called bureaus. We have eighty-tw offices, for instance, in the United States. Each on of those is called a bureau. We have seventy-nin bureaus in foreign countries. Each one of thes bureaus serves as a central collection point for new in its particular area. This news is gathered an transmitted by leased wire, by radio teletype ma chine, by [9] Morse telegraphy, by mail to our vari ous clients, to the radio stations and the newspaper and others who subscribe and buy our services.

Q. Mr. Belnap, are you familiar with a certai agreement between the United Press and the Alask Fishing News of Ketchikan, Alaska, which is date

(Testimony of David F. Belnap.)

June 30, 1945? A. Yes, sir.

Q. Attached to the plaintiff's complaint is a copy, Exhibit A, of this contract, and you will note in looking at this contract that it calls for United Press to furnish to the Alaska Fishing News its regular news report, a sixty-minute transmission each day for six days a week; is that correct?

A. It says, "its regular news report and agrees as far as practicable to deliver to the publisher such news report by radio teletype for one hour daily on each of the six regular publication days each week" —yes.

Q. That is a carbon copy of the contract entered into between these parties? A. Yes, sir.

Q. Now, are you familiar with what a regular news report consists of, and, if so, would you please explain it to the Court and jury?

A. Yes. A regular news report is the news gathered by the United Press each day. [10]

Q. What are the mechanics of choosing the particular news and sending it to the newspaper publisher? Just how do you go about doing that?

A. Well, we have, for instance, around the world ten thousand correspondents, staff corespondents, editors, photographers, reporters, telegraphers. The news is gathered by the correspondents, staff correspondents. It is filed to the nearest bureau of the United Press. It is edited there and transmitted by a telegrapher, or what we call a teletype operator nowadays, since teletypes have principally replaced the telegraph, onto our wires.

(Testimony of David F. Belnap.)

Q. In a sixty-minute transmission, how many words are transmitted to the newspaper publisher

A. Teletype machines have a geared speed of approximately sixty words a minute, and in a one hour transmission, approximately thirty-five hundred words of copy are transmitted.

Q. That is your regular news report; is that true? A. Yes, it is.

Q. What does it consist of; I mean, in the nature of the news; what kind of news does it consist of; does it comprise—world news, local news, or what?

A. It comprises world news, sports news, regional news, feature news.

Q. Was it your duty as manager of the Northwest Division of [11] United Press to furnish this regular news report to the Ketchikan News?

A. Yes, sir.

Q. That has been your duty since 1952?

A. That is right.

Q. Is all the news that you send to the, that you have sent in your time to the Ketchikan Daily News was that all transmitted from Seattle?

A. Yes, it was.

Q. Was there any of it transmitted from Alaska

A. Not directly, no; not that I know of.

Q. Well, what do you mean by "not directly"

A. Well, news from Alaska would be transmitted by our correspondents at various Alaska points to us in Seattle and be edited by us there, since Seattle

(Testimony of David F. Belnap.)

is the nearest bureau to Alaska, and transmitted on regular circuit back to Alaska.

Q. It is all transmitted from Seattle to Alaska?

A. That is right.

Q. Do you have any offices in Alaska?

A. No, we don't.

Q. These correspondents, are they regular employees of United Press? A. No, they are not.

Q. How are they compensated? [12]

A. They are called correspondents other than staff correspondents; and, when I say staff correspondents, I mean men employed on the staff of the United Press and paid a regular wage of salary. In addition to men of that kind, we employ a great number of what is called part-time or string correspondents. These people who are—the word "string" is a piece of nomenclature from the newspaper business dating back a number of years—these part-time or string correspondents are people who are, as a rule, regularly employed on a newspaper or a radio station in the particular area in which they live and whose duties for that newspaper or radio station are to gather news for that organization. In addition to that we take them on as part-time correspondents, and they furnish to us certain news that they gather in the ordinary course of their business for the person for whom they work. This news is filed to us for our service.

Q. Now, in addition to the regular news report that you furnished to the Ketchikan Daily News,

(Testimony of David F. Belnap.)

did you render any other service in the way
news?

A. In addition to the one-hour daily transmi
sion called for in the contract here, yes; we su
plied the Ketchikan Daily News with a daily ai
mail drop.

Q. What is that?

A. Of feature material. Well, it was a daily ai
mail [13] package. We call it a drop in our busine
instead of air-mail package. And in it was a certai
number of feature and what is called time-co
stories.

Q. Was there any additional charge assess
against the News for this air-mail drop?

A. No, there wasn't.

Q. In addition to the rate in the contract?

A. No. We also supplied the News with what w
call bulletin protection. Their file moved out
Seattle from 11:00 a.m. to 12:00 each day, Pacif
Standard Time. When a news story of great in
portance occurred and moved on our wires after th
file with Ketchikan News was cleared at noon, w
were—we sent a brief telegram overhead to th
News on an irregular basis, I mean, depending
the news breaks, for their edition.

Q. Can you state whether the news report tha
you furnished the Ketchikan Daily News under th
agreement that you have before you was furnish
as a part of the regular and customary business a
tivities of the United Press? A. Yes, it wa

Q. When was the first time since you have bee

(Testimony of David F. Belnap.)

in the Seattle office that you ceased furnishing the news report to the Ketchikan Daily News?

A. We ceased furnishing the news report to the Ketchikan Daily News after February 18, 1954. [14]

Q. Will you state why you ceased furnishing the news at that time?

A. Yes, I can, because we had received a telegram from Mr. Paul Charles telling us that he would not accept any more news from us and advising us that he was taking out our teletype machine and shipping it back to Seattle.

Q. Can you state whether United Press Associations at that time and since that time was ready, willing and able to furnish its news report to the Ketchikan News? A. Yes, it was.

Q. Was the nature of this termination such that you considered that you were relieved of any further duties to perform thereunder?

A. Yes, it was. When they took our teletype machine out, it rendered us incapable of performing.

Q. At any time prior to January, 1954, did you receive from the Ketchikan News or Pioneer Printing Company or any of the Charles family or Mrs. Flood or any person connected with the newspaper any notice or indication—I would like to change that—any notice that they desired to terminate the contract pursuant to the termination provisions contained in the contract? A. No, sir.

Q. When was the first notice that you ever received regarding such a wish to terminate the contract? [15]

(Testimony of David F. Belnap.)

A. You mean directly from the Ketchikan News

Q. Yes.

A. I received a letter in January, dated, I think around January 14th, from Mrs. Flood, busines manager of the Ketchikan News, which letter wa sent in reply to a telegram from me. I might ex plain, if you want me to, how I came about to sen that wire.

Q. Yes; I wish you would.

A. I received, early in January of 1954, a com munication from the New York office of the Unite Press. In that communication I was told that th New York office had received from Mrs. Flood letter in which she mentioned a letter she said sh had sent the United Press in November. This ad vice that I had from New York told me that the had never received any letter from Mrs. Flood i November, that she had sent with her letter in Janu ary, a copy of that alleged letter, and that tha copy said that she wished to terminate the agree ment. I wired Mrs. Flood after receiving that, an in my wire I said I didn't understand what sh meant by a cancellation of the agreement since th agreement had just recently been renewed and tha it was not possible to cancel it at that time. Sh replied then to my wire with a letter dated, I think the 14th—I could look it up—it was dated, I think the 14th of January, and in that letter she sai that she [16] realized she hadn't given proper no tice but, nevertheless, she wanted to terminate th

(Testimony of David F. Belnap.)

agreement. And that is the first that I ever heard that they wanted to terminate the agreement.

Q. Do you know what it costs the United Press to hire a teletype operator in Seattle, to send the news to the Ketchikan Daily News?

A. Well, I know what we are paying them now.

Q. What are you paying them now?

A. We are paying them, oh, the average is about one hundred and fifty dollars a week.

Q. You are paying one man one hundred and fifty dollars a week?

A. Yes; that is a telegrapher, a teletype operator.

Q. And if he works only one hour a day, do you pay him just that one hour?

A. If he works only one hour a day, we have to pay him a full week's salary.

Q. For the full week?

A. They work a thirty-seven-and-a-half-hour week under the union labor contract we have with them.

Q. What rate were you receiving from the Ketchikan News at the time of the termination in February, 1954?

A. Sixty-one dollars and forty-five cents a week.

Q. And you were paying the operator one hundred and [17] forty-five dollars a week?

A. We were paying, yes, our Seattle operators an average of one hundred and fifty dollars a week —one hundred and forty-five to one hundred and

(Testimony of David F. Belnap.)

fifty dollars. That included overtime for work on the sixth day.

Q. What other newspaper clients do you have in Alaska?

A. We have the Anchorage Daily News.

Q. That is the only one? A. Yes.

Q. Do you have some radio stations?

A. Yes; we have one radio station, now.

Q. Does that require a separate operator or the same operator to send the news report to the Anchorage News and the Ketchikan News?

A. Well, a night operator is required for our radio work because we transmit—of course, a radio station broadcasts at night as well as in the daytime and the transmissions have to be——

Q. You have two operators in Seattle, then?

A. No. At present we have three operators in Seattle.

Q. To send to Alaska?

A. Two of which are required for our Alaska business.

Q. During the time that you were in the Seattle office from 1952, up until February, 1954, did you receive from the Ketchikan News or from any person on its behalf any [18] complaints as to the type of service that you were rendering?

A. I never received any complaints about the service until I talked with Bud Charles in February of 1950.

Q. February, 1950?

A. February, 1954; excuse me.

(Testimony of David F. Belnap.)

Q. You received no letters?

A. I received no letters; no.

Q. If there are any negotiations or correspondence, particularly complaints about the type of service, from the Alaska publisher sent to the, say, New York or San Francisco office of the United Press, would it be customary or common practice of the organization that copies be sent to you if they affect Alaska business? A. Yes.

Q. You received no complaints all the time you were there? A. That is correct.

Q. Until February, 1954.

A. Until I talked with Bud Charles in Seattle in February of 1954.

Q. Had you talked with Mrs. Flood prior to that time? A. Yes, I had.

Q. When was that?

A. Mrs. Flood came to Seattle in July of 1953, if I remember correctly, late in July. [19]

Q. Did she register any complaints with you at that time?

A. Yes, she did; not about the service, however; about the rate.

Q. Oh, about the rate, but not the service?

A. Yes.

Q. What is the total gross revenue that United Press Associations receives, or what—can you specify a date, for example, a certain month in 1953, where you know that the total gross revenue from Alaska business was so much money? Do you have any figures on that?

(Testimony of David F. Belnap.)

A. Yes. At the height, rather, at the period of time—the period of time that we received the most money, the most gross revenue for our services to Alaska was late in the year of 1953. In December, 1953, our total gross revenue for Alaska was three hundred and six dollars and some odd cents, if I recall correctly.

Q. What was your total cost of teletype operators for Alaska business at that time?

A. Three hundred and eight dollars and some odd cents. That constituted the salary of a day and a night operator.

Q. What were you receiving from the Ketchikan News at that time?

A. Sixty-one dollars and forty-five cents.

Q. Since the termination of the news report to the Ketchikan News have you made any saving on salaries of operators? [20]

A. No, we have not.

Q. You have the same operators that you had before? A. Yes, we do.

Q. Mr. Belnap, you will observe in Paragraph 2 of the contract that the publisher, Alaska Fishing News, agreed that, if the wage scale for union employees was increased, the publisher would pay the increases in union wages to the United Press. Are you familiar with that too?

A. Yes, I am.

Q. Of this contract?

A. That is the second subparagraph 2, I think.

(Testimony of David F. Belnap.)

Q. Can you tell the Court and jury just how that works, when these assessments become necessary, how they are arrived at and how they are assessed against the publishers?

A. Yes; I can explain how they are assessed against the publishers. When the United Press negotiates a union labor agreement which calls for an increase in the salary or salaries being paid to its union labor employees, it has the privilege under the contract of passing along those increases in union wages to its clients, to the radio stations and newspapers who buy its services. This business of passing along the increases in union wages is done on a percentage basis. The percentage that the increase in the union wages of all of its [21] employees covered by the union labor contract, the percentage of that increase, as applied to the total overhead of the United Press, is passed back to its clients in the form of a percentage increase in their rate. In other words, if the United Press raised its union labor salary ten per cent, that would constitute a certain percentage of increase in our overhead and that percentage of increase in our overhead would in the ordinary course be passed back to the clients of the United Press in the form of increases in their rates.

Q. For example, if you had a five per cent assessment and the publisher were paying forty dollars a week, you would increase his rate by five per cent?

A. That is correct.

Q. And that is what this Section 2, Paragraph

(Testimony of David F. Belnap.)

2, means? A. That is correct.

Q. Now, would this—let's call this an assessment by reason of union labor wage increases—would this have anything directly to do with the specific salary of the Seattle operators who were sending these news reports?

A. You mean the union labor assessments which were made against the Ketchikan News?

Q. Yes.

A. In the course of our contractual life would they have any direct relation? No; they didn't. The same percentage [22] increase was passed along to the clients in New Orleans, Louisiana.

Q. Assuming that they had not been required to use teletype operators to send news reports to the Ketchikan News and they could have been sent some other way, would these assessments, which we have been talking about, still have been made under its contract? A. Yes.

Q. So the salary of that operator was something apart?

A. The salary of the operator, which we required to send a news report to the Ketchikan News and which was charged back against the Ketchikan News, was apart from the assessments which you mentioned.

Q. How long has the Anchorage Daily News been receiving the news report?

A. Since about the late spring of 1948.

Q. And do you know what they pay for their

(Testimony of David F. Belnap.)

report? A. I know what they pay now.

Q. What is it?

A. Eighty-three dollars and nine cents a week.

Q. How much do they get in the way of time?

A. They get ninety minutes a day.

Q. You stated that you met Mrs. Flood and she complained about the rates. Will you tell us what that was about?

A. Yes. Mrs. Flood came to Seattle in July, 1953, late in [23] the month, if I remember correctly, and in the course of her visit she complained to me about the union labor assessment which we had levied in April or May of that year.

Q. What did you do about the complaint?

A. I passed her complaint along to the front office of the United Press.

Q. And was any reduction made in the rate?

A. No reduction was made on the rate.

Q. Had that assessment been made under this contract? A. Yes.

Mr. Dimond: That is all I have.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Belnap, you gave us some figures here that I didn't catch. You said in December, 1953, the gross revenue from Alaska was how much—three hundred and something?

A. Three hundred and—I have a note on that here. May I look at it?

(Testimony of David F. Belnap.)

Q. Yes.

A. It was three hundred and six dollars and twenty-four cents.

Q. And what were the expenses?

A. The salaries for operators required for the Alaska business were three hundred and eight dollars and four cents. [24] That is two operators; a day and a night operator. The day operator received one hundred and forty-four dollars and forty eight cents per week during the month of December, 1953, and the night operator received one hundred and sixty-three dollars and fifty-six cents per week.

Q. That then shows that your expenses, if I understand this right, were almost two dollars more weekly than your revenue; is that correct?

A. That is correct.

Q. Is that for the whole month? Those figures are for the whole month of December?

A. No. Those are weekly figures.

Q. So that those show a difference of expenses above revenue of almost two dollars?

A. That is what my figures would indicate.

Q. A week. Now, Mr. Belnap, let me ask you how the United Press handles the correspondents for instance, from Alaska. On what basis are they paid?

A. They are paid on the basis of the amount of useable copy that they turn into the United Press

(Testimony of David F. Belnap.)

and we are the judge of what copy is useable and what isn't.

Q. And you take those reports in and then you pick out what you think should be sent back to your corresponding newspapers in Alaska, and that is the news they get? A. That is correct. [25]

Q. Now, the United Press picks these correspondents, I suppose, for the various jobs?

A. Yes, we do.

Q. Now, you have been in the Seattle office only a little over two years? A. That is correct.

Q. Who was there before you?

A. In my capacity?

Q. Yes. A. Mr. Richard A. Litfin.

Q. And was Mr. Green there for a while?

A. Yes. Mr. Green was there before Mr. Litfin.

Q. Fred Green? A. Fred J. Green.

Q. Then was a man named Carlson there after Mr. Green?

A. No. Mr. Carlson was Seattle bureau manager.

Q. He was Seattle bureau manager?

A. Yes. He was there at the same time that Mr. Gren was.

Q. Now, in editing these news reports that you get from Alaska and from various other places, do you have any rating as to the value of news to the newspapers with whom you have contracts?

A. Yes. As much as possible we endeavor to supply the newspaper or the radio station with whom we have a contract with the specific type of news that he wishes and [26] consistent with news

(Testimony of David F. Belnap.)

value of course and with ordinary news value. News is a highly relative thing, and the value of a story on one day may not be the same news value as a story on the next day, depending on what other stories broke or were developing or had occurred.

Q. Yes, that is right; but, as a general thing, Mr. Belnap, to a local paper in Alaska the news of first importance would be, I suppose, the local or regional news, wouldn't it?

A. Not necessarily; no.

Q. If there was something important in Alaska, for instance, if the Town of Sitka burned down, that would be very important news to newspapers in Alaska, wouldn't it?

A. In my judgment it would; yes.

Q. And that would be what the newspapers would expect to get, wouldn't it, a newspaper in the Territory taking your service?

A. Yes; they could logically expect us to supply a story if the Town of Sitka burned down.

Q. Yes; to give some priority to news events of importance in the Territory, important to all the people? A. That is correct.

Q. And then what would rank next?

A. Well, it is pretty difficult, sir, to answer what would rank next. [27]

Q. I mean in class of news.

A. It is even difficult to determine in class of news because it depends on the news that is breaking on any given, particular day.

Q. Well, for instance, take in the case of Alaska,

(Testimony of David F. Belnap.)

Washington news, Washington, D. C., news would be rather important, any Washington news affecting the Territory, wouldn't it?

A. Yes, it would be.

Q. These hearings on important things, like the aboriginal Indian affairs, and the pulp company contracts, and so on, would be important to this region, wouldn't they?

A. Well, I would, before being able to say how important, have to see the story and know the circumstances, and I wouldn't want to give an opinion on that.

Q. Then foreign news would generally be at the bottom of the list, wouldn't it?

A. Depending on what was happening, of course. If the King of England were assassinated, I would say that would be the top piece of news.

Q. That is right; but as a class, I mean, ordinarily?

A. Ordinarily, I would say, as a class of news, no, foreign news wouldn't be at the bottom. Foreign news in my judgment is important.

Q. Well, if Mr. Molander, one of your witnesses, says that foreign news would be at the bottom, he would be wrong—I [28] mean as a class?

A. Well, I just can't say that as a class of news foreign news would be at the bottom; no, sir.

Q. I mean for a local paper in Alaska?

A. No, sir; I can't say that.

Q. In other words, wouldn't your local news, your local or regional news, of course in the Terri-

(Testimony of David F. Belnap.)

tory, rate first, and your Washington news second, national news third, and foreign news last; wouldn't that be—I mean, as a class?

A. I wouldn't say that; no.

Q. There would be important items in one class——

A. It is a relative proposition. It would depend each day in my judgment on what it was.

Q. Now, you say that you did not receive complaints of the service from the Ketchikan News. You didn't receive any, you said?

A. No, I didn't receive any until I talked with——

Q. You don't mean to say that none were sent?

A. No complaints were received by me.

Q. But, as far as you know, you don't know what Mr. Green received, or Mr. Carlson, or the New York office, do you?

A. No, I don't; that is, I know that no—or, rather, I assume that, if any complaints had been made to the New York office during the time I was in Seattle, they would have [29] let me know about it.

Q. Well, as a matter of fact, from examining the records here and the papers in this case, you know now that they made complaints?

A. Some number of years ago, yes, five or six years.

Q. And acknowledgements of shortcomings were made. Did you ever see any of those?

(Testimony of David F. Belnap.)

A. Yes, I have seen the letters in the file.

Q. Now, you say that you discontinued furnishing news to the Ketchikan News on February 14, 1954?

A. No. We discontinued after February 18th. We sent our last transmission on the 18th of February, 1954.

Q. Well, now, Mr. Belnap, I will hand you a series of drafts—this is in connection with our counterclaim—a series of drafts drawn by the United Press on the Miners & Merchants Bank on the account of the Ketchikan News, and ask if those were drawn after you discontinued the service?

A. Yes. These were drawn, after we discontinued the service, in error by our bookkeeping department in New York, which didn't know that we had discontinued it.

Mr. Faulkner: We will offer these for identification.

Mr. Dimond: No objection.

Mr. Faulkner: As defendants' exhibit for identification. It could be admitted, but this wasn't our case, if you want to admit it that way. [30]

The Court: Since the plaintiff, as I take it, admits this, it seems to me it could be introduced as an exhibit now, or, perhaps, it would be even superfluous to introduce it.

Mr. Dimond: We admit it in our reply to the counterclaim.

Mr. Faulkner: You didn't admit it was due.

(Testimony of David F. Belnap.)

Mr. Dimond: We denied that the amount was due because we figure we are entitled to judgment; if we would win the judgment, we would have to pay it.

Mr. Faulkner: The drafts were drawn. I think —now, let's see.

Mr. Dimond: What I mean—we deny that it was due in the over-all picture.

Mr. Faulkner: There will be a little further testimony about this from Mr. Charles.

The Court: Well, unless they have some other evidentiary value, with the admission of the plaintiff that these should not have been drawn, it seems to me that is sufficient.

Mr. Faulkner: Well, it might be, but the pleadings don't support that, and I don't know whether the jury will remember the testimony without the exhibit. I would rather have the exhibit in—a series of five drafts.

Mr. Dimond: I don't see how it is relevant. [31]

The Court: Well, I will have to instruct the jury that the counterclaim is admitted.

Mr. Faulkner: Then you don't want to admit them now.

Q. (By Mr. Faulkner): Mr. Belnap, you said that you had—you serviced the Anchorage News and had one radio station? A. That is correct.

Q. Where is that? A. Where is the——

Q. Radio station?

A. It is in Anchorage.

Q. Have you in the past few years, I mean,

(Testimony of David F. Belnap.)

during the life of the contract with Mr. Charles and United Press serviced other radio stations in Alaska?

A. Yes, we have. For a period of five years we serviced Radio Stations KENI and KFAR with a half-hour transmission in the evening.

Q. Fairbanks and Anchorage?

A. Fairbanks, and Anchorage; yes, sir.

Q. And you had the Ketchikan News and the Anchorage News? A. That is correct.

Q. Have you had them all at one time?

A. Yes, we did. We had the Ketchikan News, the Anchorage News, the Radio Stations KENI and KFAR—that was under a common contract. It was a single contract for both of them, providing for a one-half hour transmission per day [32] in the evening.

Q. Now, Mr. Belnap, are you familiar with the correspondence between the plaintiff and the defendant in which the plaintiff said that as they added other business in Alaska to the business that they were doing with the Ketchikan News the cost or expenses would be reduced?

A. I am familiar with that correspondence; yes, sir.

Q. Now, was it ever reduced? A. Yes, sir.

Q. It was?

A. Yes. You mean the cost to the Ketchikan Daily News?

Q. Yes. A. Yes, it was.

(Testimony of David F. Belnap.)

Q. I mean the over-all. I know what you mean. You had a number of increases first, didn't you?

A. There were a series of increases in the rates; yes.

Q. And then the reduction of course came out of a part of those increases?

A. No. The reduction came out of the contribution that the Ketchikan News was making toward the salary of the Seattle operator. The understanding was that we would reduce the charge being made to the Ketchikan News, in addition to its rate, for an operator as we added new business.

Q. Now, as you added new business, did you prorate the expenses of transmitting news between the Ketchikan News [33] and the others you served?

A. We were never able to do so. The expenses were always ahead of the additional revenue, and we took the cuts out of our hide.

Q. Didn't the United Press state in a letter that the Anchorage News required service at a different time and, therefore, you couldn't operate successfully—at a different time of day, I mean?

A. That may have been. I would like to see a copy of that letter again. I just don't recall it off hand, but that very well may have been.

Q. All right. Now, do you know that after the Ketchikan News discontinued its service that you serviced the Ketchikan Chronicle for a brief period, a few months? A. Yes; I am aware of that.

Q. Now, during that few months when you gave

(Testimony of David F. Belnap.)

service to the Ketchikan Chronicle you also gave service to the Anchorage News?

A. That is correct.

Q. And are you familiar with the fact or do you know if they put those on the same channel and transmitted them at the same time?

A. No, they did not.

Q. Oh, they did not?

A. No, they did not. [34]

Whereupon the trial was recessed until 2:00 o'clock p.m., April 13, 1955, reconvening as per recess, with all parties present as heretofore, and the jury all present in the box; whereupon the witness David F. Belnap resumed the witness stand, and the Cross-Examination by Mr. Faulkner was continued as follows:

Q. Mr. Belnap, just one or two more questions. First, this morning you stated that the contract, which is the subject of this action, was dated in June, 1945?

A. I think the original date on it was June, 1945.

Q. I may be mistaken. I stated to the jury that it took effect on September 1, 1945.

A. Well, the date of the contract and the effective date were different. The contract in its first sentence, I think, bears a date in June, as I recall, and the effective date, which is established under Article 8 of the contract, Article 7 or 8, was a later date.

Q. That is the date that is in there?

A. Yes.

(Testimony of David F. Belnap.)

Q. Just to clear that point up. Now, you stated this morning that after—I asked you this morning after the contract with the News was terminated by the News if you didn't then have service to the Anchorage News and the Ketchikan Chronicle for a while. I meant the Fairbanks News Miner. [35]

Mr. Dimond: If the Court please, I wonder—I would like to object to any questions regarding a happening subsequent to the termination date of this contract. This case involves the contract between United Press and Ketchikan News which was terminated on February 14th.

The Court: Well, it would all depend whether the question might elicit or is designed to elicit something that would be of evidentiary value. In other words, relating to a fact or something subsequent, if it happens to be evidentiary, if something goes on before, it is not inadmissible.

Mr. Dimond: Well, I can't see what—I think it is just going far afield—what relation subsequent contracts with other clients had to this particular case.

Mr. Faulkner: The point I made this morning was—I thought I made that clear—was that the United Press contended they could not reduce their expenses in furnishing this service by virtue of having other outlets because they had to furnish the news to these other outlets at different times, and I inadvertently mentioned there the Anchorage News and asked him, as an illustration of that, if they didn't furnish service to the Anchorage News and the

(Testimony of David F. Belnap.)

Ketchikan Chronicle after this particular contract terminated, at the same time and through the same channel, and he said, "No." Now, I want to correct my question and refer to the Fairbanks News Miner instead of the Anchorage News. That is the only purpose. The whole [36] thing is before the Court, only I gave the wrong paper, and had I given the correct paper, Mr. Belnap's answer might be different.

Mr. Dimond: The only thing is, your Honor, on this question of promises to reduce rates, which defendants apparently relied upon, we have not yet in our direct case in chief gone into that subject. We have evidence on that point, what the so-called grounds consisted of, but I don't know whether this is within the scope of direct examination.

The Court: Well, I am inclined to think that the scope of direct examination is not so limited. I think it is within the scope of direct examination. Objection overruled.

Q. (By Mr. Faulkner): Mr. Belnap, I meant to say the Fairbanks News Miner. Now, after you came in charge of the Northwest office, did the United Press furnish service at the same time to the Ketchikan Chronicle for a while and to the Fairbanks News Miner? A. Yes, we did.

Q. Now, did you furnish those at the same hours and through the same channel?

A. We furnished it at the same hour, and whether Alaska Communications Commission used the same channel to deliver it or not I can't say, but

(Testimony of David F. Belnap.)

it was furnished by us and filed by us at the same hour each day; yes.

Q. What you would furnish would be a copy which would be [37] directed to both the Fairbanks News Miner and the Ketchikan Chronicle?

A. Yes, sir.

Q. And that is the way you did it?

A. Yes, sir.

Q. I hand you this and ask you if this was a sample of the way you did it? A. Yes.

Mr. Faulkner: We offer that in evidence as an exhibit.

Mr. Dimond: I don't see how it is relevant, your Honor, to the issue.

Mr. Faulkner: It shows how the news could be furnished, two at the same time. There is some argument here, some evidence—perhaps I am getting a little ahead of it—but there is some evidence or will be that they couldn't do this. I want to show they could and did do it.

Mr. Dimond: It sounds more like the defendants' case.

Mr. Faulkner: Well, perhaps it is.

The Court: Well, the only bar to putting it in the defendants' case is if it isn't incidental to a proper cross-examination.

Mr. Dimond: I just didn't want to clutter up the record. [38]

Mr. Faulkner: Well, I don't either.

The Court: The objection is overuled. It may be admitted.

(Testimony of David F. Belnap.)

Mr. Faulkner: It may be that you will want to cut off this top part. It doesn't have any application.

The Clerk: Defendants' Exhibit A.

Mr. Faulkner: I think that is all.

Redirect Examination

By Mr. Dimond:

Q. Mr. Belnap, I have just a couple of questions. When you testified on direct examination that you had received no complaints as to type of service, did you not testify that you had received none, just during your time in Seattle?

A. That is what I testified; yes, sir; in my time in Seattle.

Q. You were not testifying to complaints that had been sent to other persons prior to your coming to Seattle? A. No, I was not.

Q. How long has United Press Associations been in existence, Mr. Belnap? A. Since 1907.

Q. About how many clients do they have now?

A. About four thousand four hundred throughout the world.

Q. And is the contract that you testified about this morning, [39] the printed form of contract which is attached to the complaint, is that the same form used with practically or all of your clients?

A. That is correct; all of our newspaper clients.

Q. Did your type or class of news report or type of news sent to the Ketchikan Daily News change

(Testimony of David F. Belnap.)

in any great way or in any way at all, say, in January and February, 1954, as compared with the type or class which was sent in previous years, at least during your time? A. No, sir.

Q. Will you explain one thing? What do tolls consist of?

This contract says something about payment of tolls.

A. The tolls are the charges made by the transmission company for transmitting the files.

Q. And who is the transmission company in Alaska? A. Alaska Communications System.

Q. What tolls are charged or have been charged to the Ketchikan papers?

A. I can give you their time press tariff which is four dollars an hour.

Q. And the publisher pays that under these contracts between the United Press and their clients?

A. Yes. It is on a tolls collect basis.

Mr. Dimond: That is all I have.

The Court: How long has the United Press used this [40] form of contract?

A. For as long as I have been in the company, sir, and, as far as I know, a good deal longer.

The Court: Has it ever been litigated?

A. Yes, it has been litigated.

The Court: That is all.

(Witness excused.) [41]

* * *

DEPOSITION OF CARL B. MOLANDER

Whereupon, the deposition of Carl B. Molander was read as follows—questions by Mr. Dimond and answers by Mr. Belnap:

Q. Will you state your name?

A. Carl B. Molander.

Q. Where do you live?

A. 3450-80th Street, Jackson Heights, Long Island, N. Y.

Q. By whom are you employed?

A. United Press Associations.

Q. How long have you been employed by U.P.A.? A. Thirty-three years.

Q. What position do you hold with U.P.A.?

A. Assistant General Sales Manager.

Q. How long have you held your present position? A. Since October, 1952.

Q. What positions did you hold previous to your present position?

A. Assistant Business Manager and Commercial Manager.

Q. Are you familiar with a certain agreement by and between U.P.A. and the Alaska Fishing News of Ketchikan, Alaska, which is dated June 30, 1945? A. I am.

Q. Do you have that agreement before you?

A. Yes. [49]

Q. Is that the original executed agreement between U.P.A. and the Alaska Fishing News?

A. It is.

(Deposition of Carl B. Molander.)

Q. Are you the Carl B. Molander who witness the agreement on behalf of U.P.A.?

A. I am.

Q. And this same agreement is executed on half of the Alaska Fishing News by Sidney De Charles, the Editor and Publisher? A. It

(Reading suspended.)

Mr. Dimond: This is Mr. Wick speaking.

(Reading resumed by plaintiff.)

Mr. Wick: I will ask that the agreement marked for identification as Plaintiff's Exhibit 1

Q. Handing you what has been marked for ide tification as Plaintiff's Exhibit 1, I will ask y when service was started to the publisher under t agreement? A. On October 3, 1945.

Q. Now, I notice that there are twelve letters other memoranda attached to the agreement. A they affixed to the basic agreement because they relate thereto? A. Yes.

Q. When did the original term of Plaintiff's E hibit 1 start and expire according to the face of t agreement? [50]

A. It started September 1, 1945, to expire A gust 31, 1948.

Q. Was that original expiration date extend in any way by a delay in daily publication of I fendants' newspaper, and if so, to what date?

A. Yes, until October 3, 1948.

Q. And that extension was pursuant to Pa

(Deposition of Carl B. Molander.)

graph 12 of the agreement? A. Yes.

Q. Was the agreement automatically renewed by its terms, and if so, for what periods and what dates?

A. Yes, from October 3, 1948, to October 3, 1953, and then again from October 3, 1953, to October 3, 1958.

Q. And those renewals were pursuant to Paragraph 8 of the agreement? A. Yes.

Q. Now I will ask you if at any time prior to October 3, 1953, the Defendants ever gave you any notice, either verbal or written, that they desired to terminate the agreement pursuant to Paragraph 8? A. No.

Q. Did the Defendants otherwise give you any notice between April 3, 1953, and October 3, 1953, or at any previous date that they desired termination of the agreement on October 3, 1953?

A. No. [51]

Q. And when do you say that the basic agreement, which is Plaintiff's Exhibit 1, expires by its terms, except as it may otherwise be modified?

A. October 3, 1958.

Q. Now referring to the attachment to the basic agreement which bears date of February 21, 1950, and is entitled "Modification of Agreement," I will ask you if that modification was still in force at the time service was refused by the Defendants on or about February 14, 1953? A. It was.

Q. Had the Defendants given you any notice

(Deposition of Carl B. Molander.)

whatsoever that they desired termination of the sus
pension as provided for in said modification o
February 21, 1950? A. No.

Q. If either you or the Defendants had give
such a notice what if any would have been the result
so far as the weekly rate was concerned?

A. The then existing rate of $52.52 per wee
would have been restored to $72.52 per week.

Q. For what period of time was this suspensio
provided for in the modification dated February 2
1950, in effect?

A. It was in effect from February 19, 1950, unt
service was discontinued on February 14, 1954.

Q. And what do you say was the effect of sai
modification on the term of the basic [52] agree
ment?

A. The basic agreement and the terms thereo
was extended by a period which was just a few day
less than four years.

Q. In other words, the basic agreement wa
thereby extended from October 3, 1958, to Septen
ber 27, 1962, because the Defendants gave no notic
that they desired the suspension lifted?

A. Yes, sir, that was under Clause 3 of the Mod
fication.

Q. Now, when was the first notice received b
U.P.A. that the Defendants desired cancellation o
the agreement?

A. That is not too clear in my mind, but I woul
say that they gave some indication of their desi

(Deposition of Carl B. Molander.)

to cancel to Mr. Belnap about mid-January, 1954. I know I received a letter from Sid Charles, dated January 22, 1954, in which he asked for a rate reduction, and then later in the middle of February, 1954, I received a copy of a wire that Paul Charles sent to Mr. Belnap, in which he requested that service be discontinued at once.

Q. Well, did you ever receive any other notification—and I am recalling to your mind a certain letter dated January 7, 1954?

A. Yes, I received a letter from Mrs. Flood, of the Daily News, dated January 7, 1954, in which she remarked that she had not received a reply to her letter of November 14, 1953, and enclosed a copy of that purported letter.

Q. Had you ever received the letter of November 14, 1953, to [53] which Mrs. Flood had referred in her letter of January 7, 1954? A. No, sir.

Q. Did you make a diligent search of the New York files, as well as have a search made of your West Coast files for such a letter?

A. We have.

Q. And did you ever locate such a letter?

A. No, sir.

Q. Well, then, the letter of November 14, 1953, was first called to your attention by reason of the fact that Mrs. Flood had enclosed a copy thereof with her January 7, 1954, letter?

A. That is right.

Q. And you have never seen the original of this

(Deposition of Carl B. Molander.)

letter dated November 14, 1953, purporting to
signed by Mrs. Flood? A. No, sir.

Q. If there was such an original letter would
have in the ordinary course of events been broug
to your attention?

A. I am certain that it would have, yes.

Q. On what date did the Defendants actual
notify you to discontinue your News Report
them? A. On February 15, 1954.

Q. And did you discontinue service at that tim

A. Yes, sir. [54]

Q. Did the Alaska Communication System noti
you on or about February 18, 1954, that since t
Defendants would not accept your News Repo
after February 14, 1954, that it could not contin
to send the reports unless you guaranteed the t
charges? A. Yes, sir.

Q. And were you willing or unwilling to gua
antee payment of these toll charges that were pa
able by the publisher? A. We were unwillin

Q. What was the basic weekly rate for servi
to the Defendants as provided in Plaintiff's E
hibit 1? A. $38.17.

Q. Was that basic weekly rate of $38.17 i
creased at any time?

A. Yes, sir, several times.

Q. Well, what was the amount of the first week
increase, and when did it become effective?

A. $1.15, and it became effective on January
1946.

Q. Will you state the Paragraph number of t

(Deposition of Carl B. Molander.)

contract under which said increase was made or permitted? A. Paragraph Second, Subsection 2.

Q. Was there a further increase in the weekly rate, and if so give me the date, amount and circumstance?

A. Yes, on April 3, 1946, the rate was increased by $52.50, because of putting on an operator at Seattle, which cost [55] the Alaska Fishing News agreed to bear.

Q. Well was this charge for the Seattle operator thereafter reduced by you, and if so give the date and amount of such reduction?

A. On October 28, 1946, after arrangements with the Charles, we agreed to absorb part of this Seattle operator's salary, and the weekly rate to the publisher was reduced by $27.50.

Q. A week? A. Per week.

Q. And after such reduction what was the then going weekly rate?

A. The rate was cut to $64.32, the Charles agreeing to pay $25 a week toward the Seattle operator's salary.

Q. Were there any further increases in weekly rates, and if so I should like to have them in chronological order? A. Yes, there were.

Q. Well, then, what was the effective date and amount of the next increase, and what was it for?

A. On December 29, 1946, the rate was increased by $3.05 a week for increased operator's wages.

Q. Why was such increase made necessary?

(Deposition of Carl B. Molander.)

A. After negotiations with the Telegraphe Union we had to make concessions, and this v their proportionate share of the increase in cost us. [56]

Q. Will you state the Paragraph number of contract under which said increase was made permitted?

A. Paragraph Second, Subsection 2.

Q. In other words, after you had figured yo additional costs due to this wage increase wh was forced upon you by the leased wire operato union, you arrived at a percentage by which th additional costs bore to your total receipts from your contract clients? A. Yes, that is rig

Q. And the same percentage was applied to weekly rate which each of your contract clients p to you for your service? A. Yes, sir.

Q. And by so applying that percentage to Ketchikan Daily News you arrived at a weekly crease for them of $3.05? A. Yes, sir.

Q. Now what was the date and amount of next increase, and what did it cover?

A. On January 4, 1948, the rate was increas $3.09 per week. This was likewise for operato wage increase.

Q. And was this increase made for the same r son as the previous increase, as to which you ha just testified? A. Yes, sir.

Q. And was this calculated and applied to your contract clients in the same manner as t previous weekly increase [57] in weekly rate?

(Deposition of Carl B. Molander.)

A. Yes.

Q. And what was the date and amount of the next increase, and what was it for?

A. On January 9, 1949, the rate went up $2.06 a week because of increased operator's wages.

Q. And was this increase calculated and applied to the weekly rates of all your contract clients in the same manner as the previous increases that you have just testified to? A. Yes, sir.

Q. Well, after this particular increase became effective what was the then going weekly rate to the Defendants? A. $72.52.

Q. And did this weekly rate remain in effect until you entered into the modification of agreement dated February 21, 1950? A. Yes.

Q. What was the effect of this modification of agreement upon the weekly rate?

A. We reduced the weekly rate from $72.52 to $52.52.

Q. In other words, beginning as of February 19, 1950, the weekly rate to the Defendants was reduced to $52.52? A. Yes.

Q. What was the date and amount of the next increase, and [58] what was that for?

A. On January 7, 1951, the rate was increased by $4.75 a week, which made the total rate $57.27 a week. This was an extraordinary cost assessment.

Q. Now, what does this extraordinary cost assessment involve?

A. It was put on because of the increased salaries to our Union members the previous year, and

(Deposition of Carl B. Molander.)

also because of the unusual increase and expense covering the Korean War.

Q. And under what provision or provisions the contract did you make such additional cost a sessment?

A. Paragraph Second, Subsections 2 and 4.

Q. And was this extraordinary cost assessme calculated and applied to all your clients in t same manner as the several operator's increases which you have previously testified?

A. Yes, sir.

Q. Was there any other increase, and if so, wh was the date and amount thereof and what did cover?

A. The last increase was made on May 3, 1953, the amount of $4.18 per week for labor wage i creases.

Q. And was this particular increase in t weekly rate calculated and applied to your contra clients in the same manner as the other increas referred to? A. Yes, sir.

Q. Did the Defendants pay for all these increas as they [59] were levied and assessed from time time until service was terminated by them as February 14, 1954? A. They did.

Q. Now, just to briefly review, the weekly sta ing rate under your basic agreement was $38.17?

A. Yes.

Q. And there was an operator's increase $1.15 per week, effective January 6, 1946, which i creased the rate to $39.32? A. That is rig

(Deposition of Carl B. Molander.)

Q. Then on April 3, 1946, pursuant to mutual arrangements, a Seattle operator was engaged on the basis of a weekly salary of $52.50 which the Defendants assumed to pay? A. That is right.

Q. And that increased the weekly rate to $91.82?

A. Yes, sir.

Q. And then on October 28, 1946, you agreed to absorb $27.50 of the Seattle operator's weekly salary, and the Defendants agreed to pay the balance of the Seattle operator's weekly salary amounting to $25? A. Yes, sir.

Q. And this reduction decreased the rate to $64.32 a week? A. Right.

Q. And thereafter there were weekly increases because of increase in Union wage scale of operators generally of [60] $3.05, $3.09, and $2.06?

A. Yes, sir.

Q. And with these three weekly increases, the then going weekly rate was $72.52?

A. Yes, sir.

Q. Now, at that time—and that would bring us up to February 19, 1950—do I understand you to say that the weekly rate that the Defendants were paying was $72.52? A. Yes, sir.

Q. And it was then that you entered into the modification of agreement dated February 21, 1950?

A. Yes, sir.

Q. And what was the effect of that modification of agreement upon the weekly rate?

A. It reduced the weekly rate by $20, or to $52.52 per week.

(Deposition of Carl B. Molander.)

Q. And subsequent to this time there was a fu
ther assessment for extraordinary costs of operati
on January 7, 1951, amounting to $4.75 per weel

A. Yes, sir.

Q. And there was a further labor increase
May 3, 1953, of $4.18? A. Yes, sir.

Q. Now, what was the total aggregate week
rate for services as of this time?

A. $61.45. [61]

Q. And did that aggregate weekly rate of $61.
exist right down to the date of termination of ser
ice? A. Yes, sir.

Q. And that was the rate Defendants were pa
ing on or about February 14, 1954? A. Yes

Q. Now, when you came to calculate the aggr
gate weekly rate for the purpose of computing yo
damages, what did you do, and what elements d
you take into consideration?

A. We took into consideration the basic rate,
mentioned in the contract, plus all of the increas
put on due to operator's increases in wages a
extraordinary cost involved.

Q. In other words, in computing the aggrega
weekly rate, instead of restoring the $20 decrea
which was granted February 19, 1950, and addi
that to your current billings of $61.45, which wou
have made a weekly rate of $81.45, you eliminat
the $25 weekly charge which the station had be
presumably paying for the Seattle operator, a
which otherwise would be considered a part of yo
costs, and you came up with a weekly rate of $56.4

(Deposition of Carl B. Molander.)

or $5 less than they were being billed for at the time the service was terminated?

A. That is correct.

Q. There was no point in considering the $25 additional [62] charge, since that represented costs, and furthermore in reducing the rate by $20 that merely reduced that particular cost item to $5?

A. Yes.

Q. And in arriving at your damages, your weekly rate was computed on the basis of $56.45 per week, rather than $61.45 per week?

A. Yes, sir.

Q. And according to your figures, how many weeks did the contract have to run after the Defendants discontinued service?

A. Four hundred and forty-nine and four-sixths weeks.

Q. Will you state what would have been the total gross receipts which U.P.A. would have received from the Ketchikan Daily News under your agreement of June 30, 1945, for the period from February 14, 1954, through September 27, 1962, if they had continued to perform under the agreement for the balance of the term thereof?

A. $25,383.68.

Q. Now, will you state the total gross cost that you would have incurred during those 449 and 4/6 weeks, which was incidental to your having to furnish your News Report to the Defendants, and what that cost would run per week?

(Deposition of Carl B. Molander.)

A. The gross cost would be $3,894.11, or $8.66 week.

Q. Will you explain in detail how this cost fig ure was [63] arrived at, identifying the variou expenses which U.P.A. would have incurred durin each week solely by reason of having to furnish it News Report to the Defendants during the afore said period of time?

A. Since the publisher paid the total on th transmission of the service, the only costs incurre by the United Press were the furnishing of a tele type machine. On the basis of normal accountin procedure, which is in line with the American Tele phone and Telegraph Company's rental charges th machine costs amounted to $8.54 a week, and th additional cost of 12 cents to cover the usage of th paper.

Q. And those are the only expense items tha have been eliminated because the Ketchikan Dail News was dropped from the Alaska circuit?

A. Yes, sir, that is right.

Q. And what is the difference between the ag gregate amounts you would have received from th Defendants and your costs incidental to furnishin your News Report to them for the unexpired por tion of your service agreement?

A. $21,489.57.

Q. And is that the amount of your damages, o what you would have considered you will have lost

A. Yes, sir, it is.

Q. State whether or not the News Report whic

(Deposition of Carl B. Molander.)

you furnished [64] to the Ketchikan Daily News under your agreement of June 30, 1945, was furnished as a part of the regular and customary business activities of U.P.A.? A. It was.

Q. And will you state whether or not U.P.A. was ready, able and willing on February 14, 1954, and thereafter, to continue furnishing its service to the Defendants pursuant to your contract?

A. We were and still are.

Q. Why did you discontinue furnishing that service to the Ketchikan Daily News?

A. They ordered us out. They said they were shipping the teletype machine and also said they could get a better rate elsewhere.

Q. After the Defendants ordered you out and told you that they were shipping the teletype machine, did you accept this as a repudiation of the contract and consider that you were relieved from further performance thereunder?

A. We did, yes, sir.

Q. Based upon the damage figures which you have heretofore given, will you state whether or not this is the net profit which you would have made in furnishing your News Service to the Defendants for the balance of the term of the agreement and the amount of that net profit?

A. Yes, it would have been net to us and it would total [65] $21,489.57. I should say this is the money which we should have got, but won't if the Charles' have their way about it.

Q. In other words, the difference between $56.45

(Deposition of Carl B. Molander.)

per week, the amount you would have received, a
$8.66 per week, the cost of maintaining your servi
to the Defendants, represents the net gain per we
which you would have realized under your agre
ment if you had been able to continue the servic

A. That would be the minimum, yes.

Q. Is it part of your duties as Assistant Ge
eral Sales Manager to have knowledge of the cos
and expenses which U.P.A. incurs in furnishing i
News Service to various newspapers and rad
clients and in particular to the Ketchikan Dai
News? A. It is.

Q. Are you personally familiar with all t
costs and expenses which U.P.A. incurred each we
in furnishing your News Service to the Ketchik
Daily News? A. I am.

Q. Will you state whether the information whi
you have heretofore given with reference to tho
costs and expenses is based upon facts and figur
which are contained in the business records
U.P.A., which you have examined? [66]

A. They are.

(Reading suspended.)

Mr. Faulkner: May it please the Court, I obj
to that question as not the best evidence. I think
are entitled to have some books of account or sor
computation of costs instead of this man's stateme
that he examined the books. It isn't the best e
dence, so I object to that question.

(Deposition of Carl B. Molander.)

Mr. Dimond: I doubt whether the best evidence rule applies here, your Honor.

The Court: Will you read that question again?

Mr. Dimond: "Will you state whether the information which you have heretofore given with reference to those costs and expenses is based upon facts and figures which are contained in the busines records of U.P.A. which you have examined?"

The Court: Well, it seems to me the best evidence rule would apply. It calls for the contents of business records. But the question that occurs to me is whether this objection is available now. If I recall the rule governing objection to depositions, if the objection is one that could have been made at the time of taking the deposition and could have obviated the difficulty, it should have been made then; otherwise, it can't be made at the time of trial.

Mr. Faulkner: Well, of course it couldn't in this case, your Honor, because this was taken in New York and we [67] weren't there and we had no way of being there and making objection to it or cross-examining him on it.

Mr. Dimond: You had the opportunity.

Mr. Faulkner: I think they are obliged to furnish the best evidence here in order to admit this.

The Court: Well, of course, if there is no objection made at the time the evidence goes in, the rule can't be invoked later. I think that the objection could very well be made if it weren't for that situation, that it could have been made and wasn't. Now,

(Deposition of Carl B. Molander.)

I suppose that the plaintiff does not have his r
ords here?

Mr. Dimond: I don't know.

The Court: The records to which reference
made there in that question.

Mr. Dimond: You don't have all these record

Mr. Belnap: No, I don't have.

The Court: Well, I think the objection will ha
to be overruled on the ground that it is an objecti
that should have been made at the time of taki
the deposition and would have obviated this defe

(Reading resumed by plaintiff.)

Q. Are the facts and figures and the entries ma
in connection therewith done in the regul
course——

(Reading suspended.)

Mr. Belnap: I don't think I gave the answer
that [68] previous one, before the objection w
made.

Mr. Dimond: Well, what is the answer to t
previous one?

(Reading resumed by plaintiff.)

A. They are.

Q. Are the facts and figures and the entr
made in connection therewith done in the regul
course of the day-to-day business of U.P.A.?

A. They are.

Q. Will you state whether or not it has been t

(Deposition of Carl B. Molander.)

practice for U.P.A. for many years to maintain in the regular course of its business detailed records setting forth the costs and expenses incurred in connection with serving its clients? A. Yes.

Q. State whether or not it has been the practice of U.P.A. for many years to have notations made in its records so that they will fully and completely reflect the costs and expenses incurred by it in furnishing its service to any particular radio station or newspaper client? A. Yes.

Q. State whether or not the various books and records of U.P.A. from which you have received the information to which you have testified have been kept pursuant to the aforesaid practices? [69]

A. They are.

Q. And would you state whether or not you are familiar with the books and records to which you have just testified and to the manner in which such books and records have been kept? A. I am.

Q. State whether or not those books and records are a part of the official and regular books and records maintained by U.P.A. relating to its costs, expenses, charges and payments? A. They are.

Q. State whether or not the persons who made the entries in such books and records were making such records pursuant to their regular day-to-day business duties? A. That is right.

Q. State whether or not it was part of the regular day-to-day business duties of U.P.A.'s employees to keep those books and records and to keep them systematically and accurately to the best of their

(Deposition of Carl B. Molander.)

ability? A. That is right.

Q. And from all the foregoing would you s
that you were personally familiar with the boo
keeping practices which you have heretofore tes
fied to and particularly with respect to those pra
tices as they relate to the Ketchikan Daily [7
News? A. Yes, I am.

(Reading concluded.)

Mr. Dimond: And that is the end of the dep
sition. Attached to the deposition is the origin
contract signed by the parties to this action with,
Mr. Molander has testified to twelve documents co
prising modifications and actually a part of th
contract. I would like to offer in evidence th
printed contract with the documents attached. So
of them may be duplications.

The Court: Well, what are the documents th
are attached to it—the modifications?

Mr. Dimond: They are documents that refle
the agreements between the parties, the correspon
ence showing the change in rate and reductions a
modifications.

The Court: Is it complete in that respect?

Mr. Dimond: Yes, it is. (Handing proposed e
hibit to Mr. Faulkner.)

The Court: Well, the contract with supporti
papers may be admitted in evidence.

The Clerk: That will be Exhibit 2. [71]

* * *

Defendants' Case

PAUL S. CHARLES

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Charles, please state your name.
A. Paul S. Charles.
Q. And where do you live?
A. Ketchikan, Alaska.
Q. How long have you lived here?
A. Oh, since 1926.
Q. And what have you been doing?
A. Working at the newspaper business.
Q. For how long? A. Since 1927.
Q. Since 1927? A. Yes.
Q. What was the newspaper?
A. The Chronicle.
Q. How long did you work there?
A. Seventeen years, I believe.
Q. And then you went with another paper?
A. Then I went over to the Alaska Fishing News.
Q. And who owned the Alaska Fishing News?
A. Sidney Charles, my father. [115]
Q. And how long were you there? Do you remember what year you went there?
A. Frankly, no; but it was, I think, about 1940, or '39—'40, around there.

(Testimony of Paul S. Charles.)

Q. And you have been there continuously sinc

A. Yes.

Q. Now, how often was the paper publishe What paper did you publish then?

A. The Alaska Fishing News, and at that ti it was a tri-weekly. That was three times a week was published.

Q. Now, where did you get your news service f the Alaska Fishing News?

A. We got it from the United Press throu what they call a pony service, and a pony service one that they send through the telegram office in —well, it comes in a reduced form. I mean, y have to fill it in, and it comes by telegram; is wh it was.

Q. Now, did you have the United Press Servi several years prior to September, 1945?

A. I believe we had it three years.

Q. And was it satisfactory?

A. Yes; at that time I considered it satisfacto

Q. And you are familiar with the type of ne they were sending you at that time?

A. Yes. [116]

Q. And when you—then you are familiar wi the contract which is the subject of this lawsu which went into effect in September, I believe, 19 somewhere around there? A. Yes, I am.

Q. Now, that contract refers to a news repo What did you understand was to be the nature the news report with reference to the reports y had previously received from the United Press?

(Testimony of Paul S. Charles.)

A. Well, I felt the nature of that report, from what we had received three times a week, that naturally it would be a much fuller report, much more detail, and so forth, and, first that it would be regional news or Alaska, which we always specified, that we would probably get, concentrate on Alaska; next would be your Pacific Northwest; and third would be Washington News; and then your fourth would be world news.

Q. Now, your understanding was that you would get that type of service under this contract?

A. We felt definitely that they would concentrate on Alaska, Pacific Northwest and Washington.

Q. And was your understanding based on your previous experience with them?

A. I would say it was.

Q. Now, you began to take this service in 1945; did you [117] continue the tri-weekly paper then or did you go to a daily?

A. We went to a daily shortly after we signed up, I believe, for the teletype man, and shortly after that, I don't remember just how many months, we went into a daily newspaper.

Q. I think one of the depositions here mentioned that the contract was dated September 1, 1945, and that you actually began the service on October 3, 1945. A. That would be about right.

Q. That would be about the time you went to the daily? A. Yes.

Q. Then you took the service then by teletype when you inaugurated the daily? A. Yes, sir.

(Testimony of Paul S. Charles.)

Q. Now, who owned the Alaska Fishing News a the time that this contract was entered into?

A. In 1945?

Q. Yes.

A. Well, Sid actually owned the Daily New until such time as we made it into a stock corpora tion; he was the sole owner, I would say.

Q. He was the sole owner?

A. That is right.

Q. That is your father? [118] A. Yes.

Q. He is quite an old man, isn't he?

A. Well, he is eighty-one.

Q. And what is his condition of health?

A. Well, it isn't—he can't climb any stairs a the present time, and he has had two or three hear attacks, and that is one reason he is not up her today.

Q. Now, then you say you formed a corporation Do you remember when that was?

A. The date? I don't know the exact date.

Q. Let me ask you this. Did you continue tak ing the news from the United Press as the Alask Fishing News until you formed the corporation?

A. We did.

Q. Now, what was the name of the corporatio that succeeded to the Alaska Fishing News?

A. The Pioneer Printing Company.

Q. Now, I will hand you executed articles of in corporation dated April 2, 1948, and ask what tha is; is that the articles?

A. That is the articles of incorporation; yes, si

(Testimony of Paul S. Charles.)

Q. That is the executed articles?

A. Yes, sir.

Mr. Faulkner: We would offer that. (Handing proposed exhibit to Mr. Dimond.) [119]

The Court: It may be admitted.

Mr. Faulkner: Defendants' Exhibit C—no—B.

The Clerk: B.

Mr. Faulkner: I don't know whether this should go to the jury now.

The Court: You can suit yourself.

Mr. Faulkner: I will pass it around. I don't want to read it.

The Court: I think, if you want them to read it, we will have to suspend.

Mr. Faulkner: No, I wouldn't want them to read it. Perhaps it would be better to file it.

The Court: Well, you can read it in argument.

Mr. Faulkner: I don't think the jury has much to do with it anyhow. This is on the question of the first or third affirmative defense—I have forgotten which.

Q. (By Mr. Faulkner): Now, Mr. Charles, at the time that you formed the corporation, the Pioneer Printing Company, one of the defendants here, did you transfer to that company the property formerly belonging to your father and operated as the Alaska Fishing News? A. Yes, sir.

Q. I will hand you a bill of sale and ask you if that was the transfer that was made at the time?

A. Yes, sir. [120]

(Testimony of Paul S. Charles.)

Mr. Faulkner: We will offer that. (Handing proposed exhibit to Mr. Dimond.)

Mr. Dimond: I have no objection.

Mr. Faulkner: Defendants' Exhibit C.

The Clerk: C—that is right.

Q. (By Mr. Faulkner): Now, Mr. Charles, that bill of sale is signed by yourself and your father and your wife? A. That is right.

Q. Did you own an interest in the partnership at the time you signed the bill of sale, or why was it that your signatures were on there?

A. Well, actually, there would be no indication that I ever owned anything in the Alaska Fishing News, although I had put money into it, and it was considered, I mean, that I did own a part, or supposedly, but actually it never showed that I owned any of the Alaska Fishing News.

Q. Now, when you formed the corporation, are you familiar with the way that the stock was issued generally familiar with it?

A. Well, generally, yes. I think that Perry Hilleary held $10,000.00 worth; Robert DeArmond held $3,500.00 worth; I only held one share in the corporation, I believe, and other stock had never been issued to me; and I think Sid has one share in the corporation.

Q. And what was the par value of the [121] shares A. $100.00, I believe.

Q. I will hand you Minutes of First Meeting of Stockholders, or what purports to be, and ask you if that is correct? A. Yes, sir.

(Testimony of Paul S. Charles.)

Mr. Faulkner: We will offer that. (Handing proposed exhibit to Mr. Dimond.)

Mr. Dimond: No objection.

Mr. Faulkner: Defendants' Exhibit D.

The Clerk: Exhibit D.

Q. (By Mr. Faulkner): Now, you say that the only certificates of stock issued to date in the corporation were to Robert DeArmond, Perry Hilleary, and who else?

A. Pat Charles, my wife, and I, and Sid; and Marie Flood now has stock.

Q. Now, has any stock actually been issued to you or your wife or your father?

A. I believe just one share.

Q. One share so far. Now, I will ask you if these are the, what I am handing you, are the stock certificate stubs of the stock that has been issued?

A. DeArmond, Hilleary, and Mrs. Flood.

Q. Now, these stock certificates begin at No. 5. What about Nos. 1, 2, 3, and 4; have they ever been issued? A. No.

Q. That would be your father's, yours and your wife's? [122] A. That is right.

Mr. Faulkner: We will offer these. (Handing proposed exhibit to Mr. Dimond.) This will be Defendants' Exhibit E.

The Clerk: E.

Q. (By Mr. Faulkner): Now, Mr. Charles, I will ask you this question. This contract that United Press sues upon has a provision in it that the Alaska Fishing News will guarantee that the contract will

(Testimony of Paul S. Charles.)

be carried out by the successor. I will read you this "In the event of sale, transfer"—I am reading from the contract, Paragraph 8—"In the event of the sale, transfer or consolidation of the aforesaid newspaper property of the Publisher, the Publisher hereby guarantees that his successor or assignee will fulfill the terms and conditions herein contained for the full life of this agreement."

Now, was there any document ever signed or anything ever done to bring that to the knowledge of the corporation, except what you and your father knew about it? A. I don't believe there was.

Q. Now, was that ever brought to the knowledge of the chief stockholders, Perry Hilleary and Robert DeArmond? A. No.

Q. Did they have anything to do with it?

A. No; no, I don't think they had anything to do with the press service whatsoever. [123]

Q. Was there ever anything done about their assuming this contract? A. No.

Q. Except that you and your father continued on there to manage the paper, of course?

A. That is correct.

Q. And you continued the news service with the United Press; that is right, is it?

A. That is correct.

Q. As far as the other stockholders are concerned and the official records of the company there is no indication that there was ever any assumption of this contract by the corporation?

A. No, sir.

(Testimony of Paul S. Charles.)

Q. Now, let's go back to the contract, to the service furnished under it. Did you have some trouble with United Press over this contract, over the service they were furnishing you?

A. Yes; we have had trouble over the service, and we have made numerous complaints to them, and constantly we sent telegrams to them, and over stories that we were scooped on day in and day out and that came out of Washington, D. C., and out of the Pacific Northwest, and constantly we had one complaint after the other, and my father used to go down and file a telegram every second or third night [124] to the Seattle office of Harry Carlson asking for them to get on the ball and quit getting scooped, and he would name the stories and so forth, and it was such as the pulp mill we were scooped on here, and we had informed them at times to keep a check on that and on the Indian Affairs and different things, and then constantly they would make alibis. Well, the newspaper can't exist on alibis by a press service, and this thing has been going on, and Governor Gruening made a complaint about the way they handled a story about him and the Governors' Conference. They mentioned everything in the Governors' Conference, and we had a copy sent to us of the letter, and they mentioned everything in the Governors' Conference, including statehood for Hawaii, which was a unanimous resolution by the governors for statehood for Hawaii and Alaska,

(Testimony of Paul S. Charles.)

but Alaska was left entirely out. Well, I mean, they are furnishing an Alaska service. You would think they would include that.

Q. Well, now, just a minute.

Mr. Faulkner: I will state to the Court that I will connect all this up by exhibits. I am just asking him to state generally now what is the nature of the things.

Q. (By Mr. Faulkner) Now, you have referred here to a news item that was sent you by the United Press on a Governors' Conference? [125]

A. Yes, sir.

Q. And what was done at that Governors' Conference; do you remember?

A. Well, one thing they did was they did pass this resolution for statehood unanimously for Hawaii and Alaska, but the UP story came over with a story about the western governors and even mentioned—well, let me see if I can recollect that story—it even mentioned fertilizer at the start, but at the very bottom it said other developments and then it mentioned statehood for Hawaii, but nothing for Alaska.

Q. Now, did the Associated Press carry the full news on that? A. Yes, it did.

Q. Did the Governor of Alaska complain about that? A. Yes, he did.

Q. And you have a copy in your files of the letter he sent the United Press? A. Yes.

Mr. Faulkner: I believe the United Press, your Honor—I made a request for admission of the

(Testimony of Paul S. Charles.)

original letter, and they said that they couldn't find it. Now, I will offer now a copy of that letter which we have here.

Mr. Dimond: What is the date of that letter?

Mr. Faulkner: It is April 29, 1948. It is in your demand there. [126]

Mr. Dimond: If the Court please, I would like to interrupt just a moment and object to the introduction in evidence, either by way of exhibit or testimony of Mr. Charles, of any instances of purported poor service that occurred prior at least to the modification of the agreement entered into on February 21, 1950, or even the automatic renewal date of the contract which went into effect on October 3, 1953, under the terms of the contract. I think that the law is that in a case of this kind that, assuming that these cases that Mr. Charles testified about were breaches by the plaintiff, which we don't think they were, that they have waived those by continuing to accept service under the contract subsequent to that time by paying the rates and so forth, and I think that that can be established, your Honor. I think that these things clutter up the record and they are not competent evidence.

The Court: That might be true if the defendants were counterclaiming as a result of such breaches, if they were breaches, or unsatisfactory service, but all that this evidence is being put in for is for its evidentiary value. In other words, if the defendants were basing a counterclaim on it, then the question of waiver would arise, but, since this

(Testimony of Paul S. Charles.)

is merely introduced or offered for its evidentiary value, this objection that you make is not available to you, and, particularly since the relationship of the parties leading up to the breach is relevant and material, why, the objection [127] will have to be overruled.

Mr. Faulkner: Your Honor, I might state—this might have application to something else—but this is a very drastic contract drawn by the plaintiff, a printed form, and it extends for a long period of years, and we couldn't very well come in and terminate it because of one breach, but I want to show that these were these breaches of service which continued over a period of years and we kept on going until we just had to terminate the contract, so that is the evidence that I expect to put in, and this is just a part of it.

Q. (By Mr. Faulkner): I will ask you, Mr. Charles, if that is a copy of the complaint that Governor Gruening sent to the United Press Service? A. Yes.

Mr. Faulkner: You have this?

Mr. Dimond: Yes.

Mr. Faulkner: We will offer this in evidence.

The Court: If there is no objection, it may be admitted.

(Marked Defendants' Exhibit No. F.)

Mr. Faulkner: I would like to read this very briefly to the jury at this time. This is dated:

(Testimony of Paul S. Charles.)

"Room 6412, Interior Building, Washington, D. C., April 29, 1948. Mr. Hugh Baillie, President, United Press Association, New York, New York. Dear Mr. Baillie: [128]

"I would like to call your attention to the disparity between the AP and the UP stories out of Sacramento on the matter of the Statehood resolution. The matter is of some importance to me and naturally of considerable interest to Alaska. The resolution which I introduced and which was passed unanimously by the governors, copy enclosed, urged action equally at this session of Congress in behalf of Statehood for both territories. You will note that the UP story sent to Alaska for some unaccountable reason left Alaska out of the story and merely mentioned Hawaii.

"You can understand my feeling, I think, that the readers of the UP papers in Alaska were deprived of what to them would be the item of greatest interest. I would appreciate knowing what your reaction is and what the reason for the correspondent's deletion of mention of Alaska in his dispatch to Alaska. The UP clipping is from the Ketchikan Daily News; that AP clipping is from the Honolulu Star Bulletin. Sincerely yours, Ernest Gruening, Governor."

Q. (By Mr. Faulkner): Now, Mr. Charles——

Mr. Faulkner: I have various newspaper clippings here which I want to introduce by another witness, your Honor, but I want to ask Mr. Charles generally.

(Testimony of Paul S. Charles.)

Q. (By Mr. Faulkner): Now, you said various complaints were [129] sent to the United Press over a period of years, was it? A. Yes.

Q. And you had letters back and forth from them? A. That is correct.

Q. Where would this correspondence be—with various offices?

A. Well, it would be mostly with your Seattle bureau.

Q. Seattle bureau?

A. Seattle bureau manager; because that is where it comes from.

Q. Who was in charge there during the periods of this correspondence?

A. Well, Harry Carlson was probably there the longest, and there were various managers; there were some there that I didn't know; but I did know Harry Carlson, and he was there for a considerable period.

Q. Did you know Mr. Green?

A. Yes, I knew Mr. Green.

Q. Now, Mr. Charles, they mention various rate increases. This contract calls for $38.17 a week for the news service plus, of course, your paying the cost of the telegraph tolls and agreed to pay the increases in the various costs that they had in Seattle; is that right? A. That is right.

Q. And those were detailed in the deposition here of Mr. Molander? [130]

A. That is correct.

Q. They increased from time to time so that you

(Testimony of Paul S. Charles.)

paid in addition to $38.17 a week the sum mentioned by Mr. Molander? A. That is right.

Q. That too. And that was all paid in full up to the time you cancelled the contract?

A. Yes, sir.

Q. You owed them nothing?

A. That is right.

Q. Now, going back to the service, in the fall of 1953, just a short time before this contract was cancelled, did you have some special difficulty about Alaska news, especially Juneau news?

A. Yes, sir. I think the final thing that decided us to quit the United Press was at the time they hired a correspondent in Juneau, George Sundborg, who acted as a correspondent for the Ketchikan, Alaska, Chronicle. He sent them news stories of considerable importance and never sent a word, apparently, to the United Press, because we never received anything from the United Press on the things that were happening in Juneau, and they were of prime importance to the people in the Territory.

Q. Now, what the United Press did then was to hire as their agent a correspondent in Alaska, a man who was a [131] correspondent of another paper to whom he gave priority; is that right?

A. That is right.

Q. That other paper happened to be your rival?

A. That is right.

Q. And you have a good many instances of things that occurred there during that period?

(Testimony of Paul S. Charles.)

A. Yes.

Q. Which will be introduced by another witness?

A. That is right.

Q. Now, that occurred in the late months of 1953, after the middle of the summer?

A. It occurred; yes, sir. We had to give up making any further protest to the UP because they paid no attention to us whatsoever; neither did they improve their service.

Q. Now, in November, 1953, did you send a letter to them stating that on account of these various things you were cancelling the contract?

A. I believe Mrs. Flood would be able to answer that. I told her previously to that that I felt that she should, when the time came for the notification, to notify them that we wanted to cancel our contract.

Q. And what did you do then—I mean, in the way of getting news service?

A. I had contacted the AP and talked with Mr. Hutchison and [132] with their other representative, the bureau manager—I don't recall his name now—and arranged for service from the AP, and then I did make a trip to San Francisco——

Q. First, why did you make that arrangement with the AP?

A. Because we weren't getting the news coverage through UP. It was a poor service.

Q. And then you continued with the UP and had to have them both?

(Testimony of Paul S. Charles.)

A. That is right; although, previously, I will say this—two and a half years ago, to overcome the handicap of UP, I put in a Scanagraver, which runs us normally about $600.00 a month, to pay the lease on this, the operator's cost and the plastics involved and keep a photographer on that.

Q. That was done to——

A. That was to offset the poor coverage so we could stay in business. That is what it meant.

Q. That cost you about $600.00 a month?

A. That is right.

Q. Then you said you went to San Francisco, so will you tell the jury about that trip to San Francisco?

A. Yes, sir. I went down to see Mr. Green about the contract.

Q. Who is Mr. Green? Well, I think he told you.

A. He was in the San Francisco office. And we talked about [133] this contract. I told him that, frankly, that I didn't believe his news service was good. I mean, we talked about the news service. We also talked about the price, and, while in his deposition he says that it was $125.00, that I stated a figure, well, I think Mr. Green is mistaken on that, because at the time I didn't state any figure.

Q. You mean—now, just a minute—wasn't it $135.00?

A. No; I think it was $125.00 that he said. But what I did tell him was that, due to the fact that we had this contract with him, that I would go ahead and take the UP on the same basis that I

(Testimony of Paul S. Charles.)

would take the AP and pay him just the same and sign the same kind of a contract for the same number of years, and that is what I said. I mean, basically, if he wanted to go, I mean, he would have to—in other words, what I said was that the news service wasn't such, that we just weren't getting the news through the UP; we had to take AP.

Q. You told him that you would get the same news service through UP?

A. That is right; I would take it, and he would have to compete on the same basis that AP would and according to the figures.

Q. Well, now, did you tell him at that time about their agent in Juneau? [134]

A. Yes, sir. I told him about Mr. Sundborg and I told him that politically Sundborg was very opposed to us.

Q. That wouldn't have anything to do with it. But you told him that he wasn't giving the UP news?

A. That is right. I showed him instances of it. I took newspapers down there.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the witness Paul S. Charles resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows.)

Q. Mr. Charles, when you went down to see Mr.

(Testimony of Paul S. Charles.)

Green in San Francisco in January or February, 1954, did you at that time have any signed contract with the Associated Press? A. No, sir.

Q. You were taking the service and you hadn't at that time signed any contract with them?

A. No, we hadn't.

Q. Now, what did you tell Mr. Green about his service?

A. I told Mr. Green that, if he wanted us to continue, he would have to give us as good service as the Associated Press and compete with the Associated Press on that basis and give us a good service.

Q. And it was Mr. Green, was it, who mentioned the $135.00 a month: he said that you [135] wanted——

A. The figure—I can't see where the figure of one hundred and twenty-five or one hundred and thirty-five entered into it, because at that time, as far as I know, we talked figures, and it is true that he said that he would—the rest of his deposition. I remember him saying that he would reduce the rate in so many years and so many years, and my feeling was that we couldn't be tied to a service unless they could give us a service over that period of years, and it wasn't a question of costs. Of course, he said, too, there one thing that I think he misunderstood. He mentioned a statement there that we had lost money. Well, I told him the last couple of years, since we had put in the Scanagraver and gained circulation, we hadn't been losing money.

Mr. Faulkner: I think that is all.

(Testimony of Paul S. Charles.)

Cross-Examination

By Mr. Dimond:

Q. With relation to this corporation, Mr. Charles, did you say that there was no written contract between you, your father and your wife and the corporation as to the assumption of the duties under the contract? You never had a written agreement that the corporation would take over the performance of the newspaper under the contract?

A. No, sir; not that I know of. [136]

Q. Did you check all the minutes of the corporation meetings to see if anything was ever said on that point? A. No, I have not.

Q. You haven't checked all those? A. No.

Q. Do you know whether the corporation directors have had regular meetings?

A. Well, we have had meetings. I wouldn't say regular meetings though.

Q. Are you an officer of the corporation?

A. Yes, sir. I am the chairman or president.

Q. But the corporation, the Pioneer Printing Company, has, since it succeeded to the Alaska Fishing News in '48, I think, or '49, it continued to receive the United Press news report?

A. That is correct.

Q. And published it in its paper, the Ketchikan News? A. That is right.

Q. And then paid for that service?

A. That is right.

(Testimony of Paul S. Charles.)

Q. I think you stated that your father, Sid Charles, was the sole owner of the Alaska Fishing News. Now, in the complaint in this action we alleged that it was owned by a partnership consisting of Sid Charles and you and your wife, and the answer to the complaint admitted those [137] allegations, admitting it was a partnership.

A. Well, it may have been considered a partnership, but I don't remember of any papers being drawn up whereby that my wife and I had actually legally any interest in the Alaska Fishing News. Naturally, I went over there; I put in money in the Alaska Fishing News; and we started—I bought machinery and things to print the Alaska Sportsman Magazine at that time.

Q. You cited many cases where you were scooped by your opposition and you assert that it was because of poor coverage by United Press. Now, do you know exactly when those dates occurred—on the dates those occurred?

A. No; on dates I wouldn't know generally. I mean, it is something over a period of time, and I believe that our news editor, who will appear, will give you a better picture of that. Mr. Brice, who is the city editor, he handles the news.

Q. Were you aware that there was a clause in this printed contract that provided for termination of giving notice at a certain time?

A. Yes, sir.

Q. You said that in your talk with Mr. Green, I think in February or January, 1954, that you had

(Testimony of Paul S. Charles.)

not signed with Associated Press, and he said in his deposition that you told him you had signed a contract with them. Which is [138] correct—had you or had you not signed a contract?

A. I had not signed a contract at that time. I told him we were going to sign a contract unless we got better service.

Q. You said you worked on the Chronicle for a while? A. Yes, sir.

Q. What years were they?

A. That was from 1927 up till about—1926, when I was going to high school, I worked there at nights on the Chronicle and then went on days in 1927 and continued on until such time as I moved over to the Alaska Fishing News.

Q. What was your capacity on the Chronicle?

A. Linotype operator.

Q. What have been your positions and capacities since you worked on the Ketchikan News?

A. Well, I am Linotype operator, pressman, general manager, floor sweeper, anything you can name.

Q. You sort of run the whole show?

A. Yes.

Q. When you received—you had a teletype machine when United Press was sending the news report? A. That is correct.

Q. Was it your job, or was it somebody else's, to edit those news reports and decide which would go in the paper and which wouldn't? [139]

A. That is up to Mr. Brice, our city editor.

Q. You didn't do that? A. No, sir.

(Testimony of Paul S. Charles.)

Q. You spoke about the United Press story relating to statehood for Alaska which Governor Gruening complained about in his letter to the United Press? A. That is right.

Q. Do you by any chance have the original transmitted copy of that story or do you have the original transmission on that date?

A. I believe we have.

Q. To find out whether that story could have been transmitted and just left out of the paper? Is that possible?

A. Well, I don't know. I couldn't state as to that.

Q. Do you preserve your transmissions that you receive, these long yellow sheets? A. Oh, no.

Q. You don't preserve them?

A. No. They go to the Linotype operator. Normally, they are edited and then they will go to the Linotype operator and from day to day they are thrown in the wastepaper basket.

Q. As I understand this, what happens is that Mr. Brice tears off the story he wants and sends it to the Linotype operator? [140]

A. That is correct.

Q. What is torn off is not saved?

A. No, sir.

Q. That is thrown away?

A. That is right. He writes the eds on them and then sends them out and when we get through with them we throw them away.

Q. There is no way to check back and see, if

(Testimony of Paul S. Charles.)

on a particular date the story appeared in your paper, whether or not it had actually been transmitted or just edited out of the newspaper?

A. That is correct.

Q. I don't understand how this, what this Scanagraver thing has to do with the United Press service, how it offsets it.

A. It offsets it from the standpoint of local pictures. The Scanagraver is something that takes local pictures. It is a circulation builder, and in order to build circulation, do something, I had to put that in.

Q. Do you still use that? A. Yes, sir.

Q. You now receive Associated Press service?

A. That is correct.

Q. Have you made any specific complaint yourself in the last, oh, say, in 1951, or 1952, 1953, about the type of [141] service?

A. Well, I think I have made various complaints. Of course, Sid makes most of them. I believe that we did make a trip. Now, what years, I couldn't say exactly. We have talked to UP representatives and talked to any of them that come through here, and my constant complaint was their news service. I mean, we just weren't getting Alaska news, and we had constant promises, one after the other, alibis, and everything, that they were going to improve their service, constantly in Alaska. They were going to send us Alaska news. I specified that we are an Alaska paper and want Alaska news.

(Testimony of Paul S. Charles.)

Q. Well, can you cite the instances where promises were made in specific cases?

A. Well, no, frankly, I can't.

Mr. Faulkner: Well, I promised the Court that the questions we asked this witness were just general and that we would follow it up by introducing these letters and also the replies, and we will do that.

Mr. Dimond: That is all, Mr. Charles.

(Witness excused.) [142]

MARIE J. FLOOD

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mrs. Flood, would you please state your name? A. Marie J. Flood.

Q. And where do you live, Mrs. Flood?

A. Ketchikan.

Q. What is your business, or you work where?

A. I am business manager for the Ketchikan Daily News.

Q. How long have you been with the Daily News? A. Eight years.

Q. Do you own some stock in the Pioneer Printing Company which publishes the Daily News?

A. I do, sir.

Q. Mrs. Flood, are you familiar with some cor-

(Testimony of Marie J. Flood.)

respondence between the Daily News and the United Press regarding the service? A. Yes, I am.

Q. I will hand you a letter here dated November 14, 1953. Now, this is a copy of a letter, Mrs. Flood, but are you familiar with that copy?

A. Yes; I wrote the letter.

Q. That is not an original but——

A. That is my copy of it. [143]

Q. That is taken from your files?

A. Yes, sir.

Q. On the letterhead of the Daily News?

Mr. Faulkner: Now, your Honor, this is a letter we queried the plaintiff about and they said they couldn't find it. (Handing document to Mr. Dimond.) I think Mr. Molander testified about it.

Mr. Dimond: Well, our client has never seen it before.

Mr. Faulkner: Well, I think the testimony of the plaintiff is that they received a copy of this letter of November 14th later on but did not receive the original at that date. That is the testimony.

The Court: Well, I don't think it is any objection anyhow to the offer.

Mr. Dimond: Not if she identifies it.

Q. (By Mr. Faulkner): This letter attached to defendants' motion for admission of documents under Rule 36, the letter dated November 14, 1953, there, is a copy of a letter you wrote? A. Yes.

Q. And did you mail that to the United Press?

A. I did, sir.

Q. To New York, to their headquarters?

(Testimony of Marie J. Flood.)

A. Yes. [144]

Q. And you mailed it on the date given in the letter? A. On November 14th.

Mr. Faulkner: Now, if the Court please, while this witness is on the stand—all of these other letters in this bundle here are admitted and that one is approved, so I would like to introduce—I think that these can be introduced all together—defendants' motion for admission of documents and the reply, and the documents are attached. Now, some of these are very vital and instead of skipping over them I would like to read them to the jury.

The Court: Do you want to offer them first?

Mr. Faulkner: Yes; I want to offer them and then——

The Court: Well, as I understand it, every one of them has been admitted?

Mr. Faulkner: Yes; except that one. Isn't that right, John?

Mr. Dimond: If the Court please, I think at the time we answered this request for admissions the plaintiff couldn't find the original of the letter dated August 26, 1949, and recently, since that time, I received a carbon copy of the letter from some of the parties in this case saying they located the letter, so I won't object to it, and we will now admit that the letter is genuine and was received.

The Court: Well, the only letter then that you haven't admitted is this one of November [145] 14th?

(Testimony of Marie J. Flood.)

Mr. Dimond: That is the only one that we have not and will not admit.

The Court: I was just thinking that, since it may become necessary to instruct the jury on that, perhaps there should be some proof of the mailing and the affixing of postage and return address.

Mr. Faulkner: I asked her if she sent it, if she mailed it the same day to the address of the United Press in New York, which is on the letter, and that is as far as we can go, and then——

The Court: Well, my recollection is that the presumption that a letter of that kind has been received attaches only upon a showing that there was postage affixed and there was a return address and it was not returned.

Q. (By Mr. Faulkner): Well, is that so, Mrs. Flood?

A. Yes. It was put in a Ketchikan Daily News envelope which holds our return address. It was not returned.

Q. It was not returned. And it had postage on it?

A. Yes, sir.

Mr. Faulkner: I would like now to offer this as Defendants' Exhibit No. G.

The Clerk: G.

Mr. Faulkner: And I would like to read those letters.

The Court: Are you asking that they be marked as one exhibit? [146]

Mr. Faulkner: Yes; I think so, because——

(Testimony of Marie J. Flood.)

The Court: Very well.

Mr. Faulkner: We have the admission there of them, which I think is important. We could take them out and just put the letters in that are attached to this.

The Court: They may be admitted.

The Clerk: That group is marked Defendants' Exhibit G.

Mr. Faulkner: Now, if the Court please, I would like to read some of these to the jury. Here is a letter to Mr. Jesse Bogue, Chicago, and Mr. Roger Johnson, Portland, dated Seattle, Washington, March 2, 1948, from Harry Carlson with a copy to Mr. Charles:

"Dear Gents:

"This is another periodic but highly important request to remind your wire filers that stories from Washington slugged for AR must move before our Alaska file deadline of 11:30 a.m. (PST) and if they come from WA after that deadline, moved as rapidly as possible so that we can cable it on an extra-time basis to our Ketchikan, Alaska, client.

"Our pioneer Alaska client, the Ketchikan Daily News, has been beaten badly twice in the last week, the AP-served opposition paper having bannered WA stories of Alaska significance while the News had not a word. Editor Sid D. Charles has the patience of Job, but [147] sometimes is justified in registering a vigorous complaint.

"We relayed his first complaint to Rosemary

(Testimony of Marie J. Flood.)

Mullany in Washington and her letter in answer certainly excuses her of most of the blame in forgetting the News. Some of that blame must be assumed by us right here in Seattle for not reminding her of what's coming up so that she can watch it. And I believe another fault may lie in delay of this news on wire filer desks.

"For instance, on March 1, a story datelined WA"——

I think that is Washington.

——"qoting C. M. Granger, assistant chief of the Agriculture Department's Forest Service, telling a Senate Interior subcommittee that Congress should extinguish any Indian rights to Alaska forest preserves, came too late to AR for the Ketchikan file. The first take was cleared from Portland relay at 12:32 p.m., and the cleanup was cleared at 2:28 p.m. (both times PST).

"It could well be that both of these takes moved in record time from WA, but it is just as possible that the entire story moved from WA in plenty of time to be relayed through HX and JO for our Ketchikan file. I would appreciate it if you would check into this matter and if the latter is true, remind your wire filers to place a priority on AR-slugged stories of this nature even if [148] there is little interest in the states generally. Usually, these stories gain prominent play in Seattle newspapers because of the high interest in Alaska hereabouts. So that should lend weight to the necessity of fast movement.

(Testimony of Marie J. Flood.)

"We had queried for this store at the request of the News, and although we finally got it, he was shut out again by the opposition. As far as he knew, according to his cable, 'again query absolutely ignored coverage Butler Senate hearing. Why opposition today bannerlined Granger's testimony vs. Alaska Indian reservations? Should I query Washington UP direct? Am greatly puzzled why can't I get action this important source Alaska News.'

"We have Rosemarie's assurance that if she is queried in advance, she will come through for us. Now all we need is fast transmission of her story to Seattle so we can shoot it to Ketchikan and prevent any further shut-outs of our best customer in Alaska by the opposition.

"Thanks for anything you can do. Best regards, Harry Carlson.

"P.S.: Here's why I think some of these stories are dying on the relay desks: Rosemarie writes that on Feb. 18, at 1:39 p.m. (EST) a story slugged WA108 moved on a pulp bid that we had queried for in response to a [149] query from Mr. Charles in Ketchikan. It was slugged for (AR) at the bottom, she writes. But I fail to see it any place in the day's file here. That story was spiked some place. It hurts worse when you learn that after queries moved from Ketchikan to Seattle to Washington and the job was done to have it die en route back to Ketchikan."

That is Harry Carlson. And here is one dated January 29, 1949.

(Testimony of Marie J. Flood.)

"United Press Association, News Building, New York, New York. Attention: Carl B. Molander.

Dear Mr. Molander:

"We have received your communication of January 14, and although if we continue UP, we have no option but to pay the extra toll, we do wish to register a complaint. It hardly seems fair to be asked to pay more for poorer service from your Washington, D. C., Alaska News Service than ever before. Since UP has been expanding in Alaska, one would think the rates would go down instead of up.

"In our opposition's issue of January 27 was an article about Governor Gruening, Joseph N. Kehoe, U. S. District Judge, Division Two; Frank C. Bingham, U. S. District Attorney for Division Two; Anthony J. Dimond, District Judge for Division Three; and Harry O. Arend, U. S. Attorney for Division Four. In the same issue of the opposition was a not so important article from [150] Washington, D. C., about 'Alaska May Escape a Ship Rate Boost.'"

That is from the News. There is a P.S. on that, too.

"Time after time we have been scooped on important Alaska news from Washington.

"We are your oldest patron and booster in Alaska, yet when you recently took in the Anchorage News, we took second place in getting our news until we made a kick. And just this week, we found

(Testimony of Marie J. Flood.)

that radio UP was shoved ahead of us. When communication is bad, with only one circuit, this throws us behind.

"A little better service from Washington, D. C., would be much appreciated. Yours very truly, Sid D. Charles."

Now, here is one the 26th of August, 1949, from Mr. Charles to United Press Associations in Seattle. Attention: Mr. Fred J. Green.

"We are in receipt of your letter of August 19th with regard to the proposed rate raise.

"We have asked Captain Major, in charge of the Signal Corps office here, for clarification. It was the first he had heard of it. He promised to write his headquarters and let us know.

"When we get the straight of the matter, if as represented, we shall go to the mat in a publicity campaign. Meantime, we would like to get from you some [151] Senators and Representatives in Congress who have UP affiliations and might help in a campaign. There is no use going to our delegate.

"In fact, there seems to be a possibility that political pro-Gruening forces may be trying to shut the UP from Alaska because the papers which take the service are anti-Gruening.

"Frankly, in case the raise is made, we cannot afford to pay it. While on this subject we would like to know if our service and that of the Anchorage News is on the same channel and for the same hour. As we understand it, the AP channel all their

(Testimony of Marie J. Flood.)

Alaska papers at the same time. The Chronicle, our rival, for instance, gets one hour service in the morning and one hour in the afternoon, gets twice as much coverage as we do, and it costs them just about half what it does us.

"We have been promised when you received any new patrons in Alaska our rates would be adjusted and lowered accordingly, but instead they have been raised.

"We are willing to make a fight against the apparent discrimination in favor of the AP against the UP in Alaska, but we also want cooperation on your part. Very truly yours, Sid D. Charles."

Here is one from the Daily News, December 27, 1949, dated at Ketchikan, to United Press Association, General [152] Offices, News Building New York. Attention, Carl B. Molander:

"Your teletype and press service is costing us just twice the amount the Chronicle, the opposition paper here, pays to Associated Press. They also get twice the wordage, one hour in the morning and one hour in the afternoon. We get one hour daily, from 11:00 a.m. to 12:00 noon.

"In a letter dated September 4, 1945, your Mr. Dan Bowerman said: 'As we added other clients in Alaska, of course, we would prorate the operator cost among them, so that the cost would decrease to you.'

"On the contrary, you have added other patrons and our costs have kept increasing.

(Testimony of Marie J. Flood.)

"On October 9, 1946, Mr. Bowerman, said, on advice from New York:

" 'That the United Press share the operator expense with you, on an open basis for an indefinite period of time, while we continue our efforts to line up added clients to share the expense. We simply would reduce your billing by $25 per week and absorb the costs ourselves. Then if we succeeded in adding one more client we would bill the $25 operating expense to him. If we added more than one, the total expense would be split three or more ways, bringing your figure down below $25.'

"Since that letter was written you have added the [153] Anchorage News, besides, we understand, some radio stations. We are told that the latest radio station, KALA, at Sitka, channeled with the same news and at the same hours as our news, has been given a reduced combination rate. If that is true, why shouldn't we receive the same benefit?

"We are perfectly willing to change our hour to get on the same channel with Anchorage News in order to cut costs.

"Frankly, we must cut costs. It just isn't in the cards to pay twice as much for half the news which our opponent gets here through the Associated Press. Unless our rates can be adjusted co-operatively and in combination with other UP patrons in Alaska, we shall have to make some other arrangements. Yours very truly, Sid D. Charles."

(Whereupon Court adjourned until 10:00 o'clock a.m., April 14, 1955, reconvening as per

(Testimony of Marie J. Flood.)

adjournment, with all parties present as heretofore, and the jury all present in the box; whereupon the witness Marie J. Flood resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows.)

Mr. Faulkner: Is the Court ready to proceed?

The Court: Yes.

Mr. Faulkner: I was reading the letters which were [154] admitted by the plaintiff. I will continue with the one of January 3, 1951, which was a letter from Mr. Jack Bisco, United Press Associations, New York, to Sidney D. Charles, The Daily News, Ketchikan:

"Dear Mr. Charles:

"The unusual increases in expense which the United Press has had to bear in 1950 are without precedent in our entire history—unmatched even by the extraordinary costs of covering World War II.

"The rising tide of big news from Korea and other theaters of international conflict plus uncommon activity on the news fronts at home have caused a heavy drain on our resources, and there is no sign of abatement in this surge of big events which must be reported punctually and comprehensively.

"During the year just past we absorbed the cost of the constantly widening scope of world news coverage while, at the same time, we met increased labor costs and, more importantly, faced up to a five-week strike to prevent those costs from going

(Testimony of Marie J. Flood.)

even higher. We fought the strike through and achieved the settlement which we believe had healthful effect on the industry as a whole.

"During all this time—through the strike, the warfare abroad and its ramifications, and while other labor costs were rising—we delayed exercising our contractual right to assess. We undertook to bear all [155] these extra costs ourselves and we continued to absorb them through 1950.

"Now the time has come when we must adjust our rates in order to meet the tasks before us. In accordance with the provisions of our agreements covering extraordinary costs, we are obliged to increase the rates for United Press service by 10%, effective with the week beginning January 7, 1951.

"We do this with confidence in your understanding and co-operation and with our appreciation for your support. Sincerely yours, Jack Bisco."

Here is a letter from Sid D. Charles to United Press Associations, Attention: Mr. Bisco, 23rd of January, 1951.

"Dear Mr. Bisco: We have given your letter of January 3rd considerable thought and while we understand and sympathize with your problem, we are in the 'same boat.'

"Until such time as we are able to make other arrangements, we must go along with you, but to compensate for this raise in rates, we must ask that you cut down our wordage or time to half an hour beginning immediately. Because of competition of another daily, we cannot advance our prices to meet

(Testimony of Marie J. Flood.)

the rising costs of production, so must take this means in keeping expenses down.

"In going over our contract and correspondence with [156] you, we find ourselves being bound for a longer and longer period of time and for a substantially higher rate than we started out with, which was to be reduced instead of raised when more customers were brought into the Association. We would like at this time to come to an agreement whereby the contract between the Ketchikan Daily News and the United Press could be terminated by either party on 60 days' notification. Very truly yours, Sid D. Charles, Publisher."

And here is a letter from the Daily News. Oh, I think I read that one. This is the one from Mrs. Flood cancelling the contract, dated November 14, 1953. I think I read that to the jury yesterday. Oh, here is one, 2/20/51. I thought this was the same as the one I just read, from Sid Charles to United Press Association, Seattle. Attention: Harry Carlson.

"Dear Harry: We appreciate your effort in trying to work out a rate for us, but we do not wish to involve ourselves in such a long term contract. Therefore, we will accept the boost in rates proposed in Mr. Bisco's letter of January 3rd.

"We are still anxious to put our contract for service with you on a more definite termination basis and would appreciate your looking into the matter. We have all other agreements for service

(Testimony of Marie J. Flood.)

on a 60-day cancellation [157] basis. Very truly yours, Sid D. Charles."

Then the one of November 14th from Mrs. Flood saying that the contract was cancelled has already been read, I believe. Now, here is a letter to Mr. Belnap from Mrs. Flood dated the 14th of January, 1954. I believe this is the one to which Mr. Belnap referred yesterday.

"Dear Mr. Belknap: I realize that we should have notified you 6 months before contract renewal which is automatic. It is unfortunate that this was not done but it does not change the fact that we wish to cancel our service with United Press.

"We have found that we are able to get three files of one hour and one half hour all before 12:00 noon at a cost less than that we are paying for, from United Press. Having two papers in a town of 6,000 doesn't leave us much margin of profit—in fact, we have been operating at a loss for the past seven years. We must make every effort to cut our costs, keep the quality of the paper above that of our opposition and get the Alaska News first.

"On this last point, Mr. Charles had considerable correspondence with Harry Carlson, formerly of the Seattle Bureau, on the poor coverage we have gotten in the past on Alaska News. We have been consistently scooped on stories that are of interest to our area by [158] the Chronicle that carries Associated Press. In the past we have made our own arrangements with Bob DeArmond who acted as

(Testimony of Marie J. Flood.)

your stringer to get coverage on the Alaska Legislature.

"In regard to the rates, we have protested each new raise, with the exception of your last one which began in May of this year and again raised the rates $4.18 per week. When we began our contract with you it was with the understanding that the rates would be lowered when you were able to get more members into the Association. I believe you have added more members, but instead of reductions, we have had raises totaling about $23.00 per week.

"I hope the above clarifys our reasons for canceling our agreement with you and you will discontinue filing anything for us beginning week of January 18th. Sincerely yours, M. J. Flood."

And here is a letter from Mr. Belnap to Mrs. Flood dated January 18, 1954:

"Mrs. M. J. Flood, Ketchikan Daily News, P.O. Box 79, Ketchikan, Alaska. Dear Mrs. Flood. Thank you for your letter of January 14 sent in reply to my telegram of January 13. In my telegram, I said I had just received word from our New York office regarding your recent letter directed there in which you referred to a previous [159] letter of November 14, the original of which was never received in New York.

"I also said I was perplexed by your reference to cancellation since the agreement between us had renewed a short time ago and a new term is now in effect. In addition there is an extension of the

(Testimony of Marie J. Flood.)

term by the conditions of a modification to the principal agreement made in February, 1950.

"Clause Eighth of the agreement between us establishes machinery for the termination of that agreement. Neither of us has ever entered a cancellation against the agreement in conformity with the provisions established in Clause Eighth, and the agreement thus continues in full force and effect. We cannot, therefore, discontinue service to you.

"I have taken the liberty of turning over to Martin Heerwald, our Washington-Alaska news manager, your comments on Alaska news coverage. We have a continuing program to expand and improve our service in every department, and your comments will be helpful to him. Heerwald will be in Alaska himself later this week, and I have asked him to get in touch with you for a more detailed discussion of these points.

"With respect to our rates, my records here show that the increases you mentioned have been more than [160] offset by reductions which have totaled nearly $50 per week during the past seven years. The latest reduction, amounting to $20, was made in February, 1950, and is still in effect. It seems to me on the basis of the information I have here that we have been very fair in the matter of rate reductions in the past, making these in the face of constantly mounting costs to us to produce our news report. I'm personally prepared to discuss the matter of rates with you further if you wish.

"We have always been proud to be on your team

(Testimony of Marie J. Flood.)

at Ketchikan, and I regret very much that a misunderstanding has arisen with respect to our agreement. It's my earnest hope that this letter will help to clarify the matter and that everything will shortly be straightened out to our mutual satisfaction.

"With warmest regards and good wishes, I am cordially yours, David F. Belnap."

Here is a letter from Mr. Charles to United Press Associations in New York, dated the 22nd of January, 1954:

"On November 14th, 1953, we wrote your office and again on January 14th, 1954, we wrote to Mr. Dave Belknap of your Seattle office explaining that the continued high cost of United Press service here at Ketchikan makes such cost prohibitive to the Ketchikan Daily News. The Daily News realizes that, pursuant to its written contract, [161] notice of cancellation should have been given at least six months before the end of the five-year period elapsed, or by March 1, 1953. While the Daily News was aware of the date of Sept. 1st, 1953, as being the end of the five-year period, it was not the intention to leave the contract renew automatically.

"If the Daily News is to continue to operate, the cost must be reduced. We have cut every other cost item possible and are still losing money. In order to be able to continue with United Press Service, we need twice the amount of the present service for the same price we are now paying. Our competition, The Ketchikan Chronicle, is now receiving two

(Testimony of Marie J. Flood.)

hours of press service at slightly less than the cost of one-hour service we are getting from United Press.

"We have relied heavily upon promises from United Press that United Press users would increase in number in Alaska, thereby cutting the cost. On the contrary, the users have not increased appreciably and the price has steadily risen. This should be an old story by this time.

"Surely, you can see the practical consequences of insisting upon attempting to hold the Daily News to the contract which, at one time was reasonable as to cost, but which has become oppressive and prohibitive to us [162] due to rising production and labor costs.

"Your reply by return mail will be appreciated. Very truly yours, Sid D. Charles, Publisher."

These are just copies, I think, of letters that I have read already; yes.

Q. (By Mr. Faulkner): Now, Mrs. Flood, I will ask you if—how long have you been with the Daily News? A. Eight years.

Q. And in that time or most of that time did you take this United Press service?

A. Yes, we did, sir.

Q. Did you typewrite letters for Mr. Sid Charles? A. Yes, I did.

Q. To the United Press Associations?

A. Yes.

Q. What were they? I mean, were they with reference to the service?

(Testimony of Marie J. Flood.)

A. I wrote all the letters.

Q. I mean, were they letters of complaint?

A. Letters of complaint; yes, sir.

Q. And in addition to the letters, some of which were introduced here, did you write any telegrams?

A. Yes; I took telegrams. Most of them we did not keep copies of, but most of them were queries for material that we needed. [163]

Q. And that you didn't get?

A. That we didn't get.

Q. You had to send telegrams?

A. Well, we called them queries asking for material that we needed.

Q. Now, do you recall that period that you said —there was some correspondence in here about it, answering it, from Mr. Carlson—do you recall the query you sent asking them to get the news from Washington on the hearings on the Butler Bill and on the aboriginal rights controversy and the pulp bid; do you recall that?

A. I knew that they were sent, but I can't recall whether I sent them or whether they were sent by Mr. Charles.

Q. But those telegrams were sent?

A. Were sent out of our office.

Q. And it was in answer to the telegrams that Mr. Carlson wrote the letter——

A. Wrote the letter.

Q. ——that I read yesterday, quoting from Miss Mullany? A. Yes.

Mr. Faulkner: Pardon me just a second, your Honor. I think that is all.

(Testimony of Marie J. Flood.)

Cross-Examination

By Mr. Dimond:

Q. Mrs. Flood, did you type up all of these letters that [164] Mr. Faulkner has read that were signed by Sid Charles? A. Most of them.

Q. Do you know of any other letters that you wrote for Sid on the same subject matter?

A. I don't recall any.

Q. Do you know how many telegrams you sent on queries?

A. I can't say how many. I have sent several in the past eight years.

Q. You don't know exactly when they were sent?

A. No; I can't say.

Q. What was this Butler Bill, this query on the Butler Bill? Do you know what that was about?

A. I can't recall offhand.

Q. You testified that you mailed the letter of November 14, 1953? A. I did.

Q. Do you recall specifically placing the stamp on the envelope and placing it in the mail slot?

A. I did.

Q. You do recall doing that. This is 1955. How many letters do you ordinarily mail in a month, we will say?

A. Well, probably about fifty; but that was a very important letter to us, and I certainly remember sending it.

Q. You definitely recall having put that particular letter in the mail box up here at the Post [165] Office? A. Well, that is hard to say.

(Testimony of Marie J. Flood.)

Q. In other words, you are just saying that in the usual course of business you would have mailed it?

A. I would have mailed it; yes, sir.

Q. Were you aware of the fact, Mrs. Flood, that under the wording of the contract a notice of cancellation should have been sent by registered mail?

A. At the time I sent the letter, no; but shortly afterwards why I read the contract thoroughly and found that I should have sent it by registered letter, so the one I sent on January 14th I did send by registered letter to be sure that was gotten and that I would know that they had gotten it.

Q. But this letter of November 14th was not sent by registered mail?

A. Was not sent by registered mail.

Mr. Dimond: That is all.

Redirect Examination

By Mr. Faulkner:

Q. Just a minute. Mr. Dimond asked you if you recalled what the Butler Bill was. I might ask you if that was not a bill for the election of a governor of Alaska? Do you recall that now?

A. I don't, Mr. Faulkner. My end of the business is the [166] business end, and I only hear these things from Mr. Charles or from Mr. Brice, and I know them only generally.

Q. But you knew that there was a query sent there about that? A. Yes, I do.

Mr. Faulkner: I think that is all. [167]

* * *

GENE BRICE

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Will you please state your name, Mr. Brice?

A. Gene Brice.

Q. Where do you live? A. Ketchikan.

Q. And how long have you lived here?

A. Well over forty years.

Q. What is your business? [173]

A. Managing editor of the Daily News.

Q. How long have you been working in such capacity? A. Three and a half years.

Q. And how long have you been in the newspaper business? A. Nearly twenty-five years.

Q. And where were you before you came to the Daily News? A. With the Chronicle.

Q. Mr. Brice, I might ask you, are you familiar with the method of gathering news by a local paper, such as the two in Ketchikan, for getting news for their readers? A. Yes.

Q. What are the two large sources of news?

A. Wire service?

Q. The associations that furnish the news?

A. Associated Press and United Press.

Q. Now, before you came to work for the News you said you were employed where?

A. By the Chronicle.

Q. How long were you employed there?

(Testimony of Gene Brice.)

A. Twenty years.

Q. Twenty years. Now, Mr. Brice, I first want to ask you—you have seen the deposition of Mr. Bowerman, I think it is—especially the form of telegram. Mr. Bowerman in his deposition, which I think you have seen, sets up a form of telegraph news service for one day as a sample of the [174] news service they send. Have you seen that?

A. No; I don't think I have.

Q. It was attached to the deposition. I think you saw it the other night. A. I don't recall.

Q. I thought you did. Well, now, this is a telegram that Mr. Bowerman has testified is the type of news service furnished, that they would furnish to the Ketchikan News, dated August 12th—I don't know what year; but I will ask you if you will just look that over; you don't need to read it in full. Now, what I wanted to ask you is whether that could well have come as a news service on some particular day? A. Yes.

Q. To the paper? A. Yes; it could have.

Q. But as a general rule did you get that type of telegram from the United Press, that type of news, each day?

A. Well, I would say, occasionally.

Q. Occasionally? A. Yes.

Q. So that this might well have been the day's news that they sent. Now, I will ask you if in your experience on the two papers that you had occasion to notice the type of news sent by the United Press and the extent of it to [175] the News?

(Testimony of Gene Brice.)

A. Oh, yes. When you work for one paper you always keep your eye on the news carried by the other paper. That is only natural. You watch the opposition or the competition, as you might call it.

Q. Now, Mr. Brice, do you keep—does each newspaper keep a file of the other newspaper's publications?

A. The Daily News keeps a file of the Chronicle, but the Chronicle does not keep a file of the Daily News.

Q. Did you notice prior to the time you went with the New instances of news that was sent by the Associated Press of importance which did not come to the News? A. Oh, on numerous occasions.

Q. Did not appear in the News. Now, did you take the file of the Chronicle and mark some of those instances?

A. Yes. I took the file for the Chronicle and a file for the Daily News, put them out on a desk so I had the two copies for each day for comparison. I went through the Daily News and then looked at the Chronicle of the same date to see if the Chronicle had stories that the United Press did not carry.

Q. I will hand you what purports to be an issue or a page of an issue of the Chronicle, January 13, 1954, and ask you if you have marked news items there which were received by the Chronicle which did not appear in the News? [176] A. Yes.

Q. Now, what are those two in that particular issue?

(Testimony of Gene Brice.)

A. One quotes Eisenhower as saying that Alaska is not yet ready for statehood.

Q. And what is the other one?

A. The other one concerns the Geological Survey Office sending men north for surveys.

Mr. Faulkner: We want to offer these. I think that, if you have no objection, we can put them all in an envelope. They are mostly set up in my answers to their interrogatories, but not all of them, not quite all of them; there are others.

Mr. Dimond: Are there others then in addition to your answers?

Mr. Faulkner: I think there are a few.

Mr. Dimond: I was wondering, your Honor, if, as long as the witness testified that these articles did not appear in the defendants' newspaper but did not testify as yet that United Press did not send similar articles in their dispatches, whether or not they would be admissible?

Mr. Faulkner: We will come to that.

The Court: I think there should be that testimony, that the United Press didn't send it.

Q. (By Mr. Faulkner): Well, Mr. Brice, how many words a day did United Press send you under its contract?

A. Approximately thirty-five hundred. [177]

Q. Was that sufficient to meet your needs if you used the entire amount? A. No, it was not.

Q. Was there any, in your experience, was there any item of news contained in the United Press dispatches that were not published in the News?

(Testimony of Gene Brice.)

A. During the two years or longer that I handled the United Press news I believe on two days items possibly two or three inches in length were deleted from the paper.

Q. What were they?

A. They were items which I considered of secondary nature; because of a heavy advertising day and considerable local news these items were left out because they were of no importance.

Q. Now, these items which you refer to in this issue of January 13, 1954, the one quoting the President on statehood for Alaska and the other with reference to the Geological Survey in Juneau, would they be considered of importance to the readers of the News?

A. I believe the people are interested in statehood.

Q. And what about the Geological Survey?

A. That is of some interest here, particularly where it mentions the possible moving of their office from the capital at Juneau to Fairbanks.

Q. Now, one of these articles is to the Chronicle by the [178] "Chronicle Capital Correspondent." Do you know who that was?

A. George Sundborg.

Q. He was also agent of the United Press?

A. That is my understanding.

Q. Now, does that go for all of these articles that are marked that way—"Capital Correspondent"?

A. Yes.

Q. And that was the same agent that the United

(Testimony of Gene Brice.)

Press furnished the News. Now, I will hand you one of January 14, 1954, an issue of the Chronicle, and ask you if you marked that and if that contains an article that was not in the Daily News.

A. That is correct.

Q. What is that article?

A. This article says, "Judge Folta May Halt Funds for Election."

Q. And that is an article of considerable length?

A. It is, yes.

Q. And importance? A. It certainly is.

Mr. Faulkner: I will offer that in evidence.

Mr. Dimond: I don't want to insist that counsel identify each individual one. All I want the witness to establish is that none of these articles or certain of them [179] were not contained in a transmission sent by United Press, not just that they didn't appear in the rival newspaper.

Mr. Faulkner: We are covering the period now when Mr. Brice was there, and I promised to connect that up with another witness to cover the period prior to that, but I think these all come within Mr. Brice's knowledge.

The Court: Well, I don't think that the objection is that these clippings don't cover a particular period but that Mr. Brice has not excluded the possibility that the United Press sent out this news. Isn't that the objection?

Mr. Dimond: That is the objection.

Q. (By Mr. Faulkner): I want to know if the News got these items from the United Press?

(Testimony of Gene Brice.)

A. The News did not receive that story from the United Press.

Q. Now, I will hand you one dated January 12, 1954, about the suicide of a prominent Fairbanks man, Jim Barrack, and ask if the News got that one?

A. No; it did not. The Daily News did not receive that story from the United Press on this day.

Q. Now, I hand you one of January 8, 1954, which has three items marked, four items marked, two of them by the "Capital Correspondent" and the other two—no; I think they are all by the—I will ask if you got those through United Press or any other way.

A. No. On this portion of the sheet I have four stories [180] marked, all concerning Alaskans or Alaska projects.

Q. What are they?

A. One is the assignment of Territorial Highway Policeman Jessie Edwards from Ketchikan to Anchorage. Another involves the E.S.C. investigation contemplated by the Legislature. A third item refers to Angoon and Seldovia listed for work relief projects. The fourth item concerns the employment of an Alaskan with the Territorial Police.

Q. I will hand you an issue of January 8, 1954, of the Chronicle and ask if you have marked some articles in there that were not received by the Daily News?

A. Yes. There are four items marked on this page.

(Testimony of Gene Brice.)

Q. Just what are they, briefly?

A. One is referring to equipment added by the Employment Security Commission. Another concerns Mrs. Al White's hopes to visit Eisenhower in Washington. Another is a recommendation for shutting down more than half of the fish traps in Southeastern Alaska.

Q. I will hand you another one marked, in the Chronicle, marked January 8, 1954, and ask if that contains some articles you have marked?

A. It does. One item concerns Alaska Public Works and road appropriations facing heavy cuts. Another one refers to the fact that there have been few filings for the 1954 [181] election in the Territory.

Q. Are some of these quite extensive articles?

A. Yes; some of them are.

Q. And did any of these articles I am showing you come to the News through United Press?

A. No.

Q. So that you didn't have them?

A. That is correct.

Q. I might ask you, generally, Mr. Brice, does that apply to all these articles that you have marked yourself? A. Yes, it does.

Q. You marked them with a red pencil?

A. I marked them by comparison between the Chronicle and the Daily News. Those items marked did not appear in the Daily News on that day.

Q. Now, I will hand you a Ketchikan Chronicle

(Testimony of Gene Brice.)

of January 7, 1954, and ask if that contains something that the Daily News did not get?

A. Yes. This concerns arguments in court regarding the Territorial Property Tax.

Q. And I hand you another one, two articles from the United Press agent in Juneau sent to the Chronicle by the Chronicle staff correspondent, and ask you what those are?

A. One concerns a winter relief project for Alaska as proposed in Washington, D. C. Another one concerns Federal [182] tin stockpiling, which would involve Alaska.

Q. I will hand you one of December 29, 1953, and ask you if that contained any similar articles of any importance.

A. One concerns territorial school bus costs, saying that the costs are far above anticipation. Another concerns an Anchorage man who is held for a slaying. Still another involves the mayor of Fairbanks vetoing an ordinance regarding gambling.

Q. Now, I will hand you an issue of the Chronicle of December 28, 1953, and ask you how many articles of Alaska news that contains which were not in the Ketchikan News? A. Seven.

Q. What are they, briefly?

A. One concerns the refusal of the Territorial Auditor to pay the costs of Alaskans attending F.B.I. classes. Another concerns the resignation of Tony Schwamm as Director of the Territorial Department of Aviation. Another one concerns work projects starting in Southeastern Alaska. Still an-

(Testimony of Gene Brice.)

other concerns a meeting of the Territorial Road Board in Juneau. One other item here—"Congressman Asks Why Farley Would Ban Herring Take."

Q. I hand you an issue of the Chronicle of December 24, 1953, and ask if that contains similar articles not sent to the News?

A. This concerns two items which were not received by the [183] News. One of them is that the Civil Service Commission was studying bonus pay for employees of the Government in Alaska. Another one concerns the payment of $100.00 a day to an investigator for the Territorial Legislature.

Q. I will hand you two other clippings of December 24, 1953, from the Chronicle and ask what those contain which the United Press did not send to the News?

A. One concerns the refusal of the Territorial Auditor to pay for typing done by the Statehood Committee. Another says that the balance of public roads funds is frozen. This one concerns a gold claim which blocks a section of an Alaskan highway.

Q. I will hand you an issue of December 23, 1953, and ask if that has similar articles, some from the Associated Press, some from the special correspondent, the agent of the United Press, to the Chronicle, which did not appear in the News?

A. The heading on one item is, "Four Alaskan Collegians to Seek Award." Another item from the Chronicle's Juneau correspondent is, "Only 15 Fire Trucks Exempt From Licenses" in Alaska. An-

(Testimony of Gene Brice.)

other item from Juneau—"Canadian Claims Yakobi's Nickel Ore Promising."

Q. Is that all? A. That is all on this.

Q. Do you know—that one regarding the nickel claims is a headline article, is it? [184]

A. That is correct.

Q. And that is a matter of considerable importance? A. It is.

Q. Now, I will hand you one—this is another one of December 24th—and ask if there are some items marked there, generally.

A. One is an application of the Territory to have more schools constructed in Alaska. Another one concerns completion of the last section of the Alaska Road Commission's program in the Territory.

Q. I hand you one of December 21, 1953, an issue of the Chronicle, and ask you if that contains similar items which were not carried by the News.

A. Yes. This Page 1 has five items.

Q. Just what are they?

A. One is that "Anchorage Voters May Buy Utility." Another is that Don Foster, Area Director of the Alasaka Native Service, is conferring in Washington, D. C., regarding a permanent job. Another item concerns vocational education in Alaska. Still another concerns new land claims in regard to native villages. A fifth item concerns the Territorial Legislature Session Laws and the penalty assessments of $3300.00.

Q. That was where the paper up there printed

(Testimony of Gene Brice.)

the Session Laws, didn't get them out in time, and had to pay a [185] penalty of $3300.00?

A. Yes, that is right.

Q. Now, I will hand you another issue of the Chronicle of December 19, 1953, which has a banner headline—"Fish Trap Reduction Plan May Be Altered," and ask if that issue contains similar items of news which were not sent to the News?

A. This is an Associated Press story which was carried by the Chronicle and the Daily News did not receive. It concerns a reduction of fish traps in Alaska and the fact that that reduction plan might be changed by the Commissioner of Fisheries.

Q. Is there any other item in that particular issue?

A. Yes. There is one here that says, "Statehood for Hawaii on Agenda." Another is a request by fisherman to open up Bristol Bay to trolling. I see one more item on this page and that regards the "All-Alaskan Chamber to Convene Soon."

Q. Now, I will give you one of December 11, 1953, and ask you if that issue of the Chronicle contains similar items which did not appear in the News.

A. These two items did not appear in the Daily News. One was by Associated Press. The other was by the Chronicle's Juneau correspondent. One regarded the damage suit involved in the big fire at Union Bay. The other heading [186] says, "Twenty Days Left to File Land Titles."

Q. Now, I hand you another issue of the Chron-

(Testimony of Gene Brice.)

icle, dated December 10, 1953, with a banner headline—"Governor, Williams Won't Oppose Dams"—and ask you what items that issue contains which did not appear in the News.

A. One reports progress——

Q. I mean, which did not come to the News from the *Associated* Press.

A. There were six news items carried in the Chronicle on this day which did not come to the Daily News through United Press.

Q. What are they?

A. One concerns the dental examination carried on by the Territorial Board of Dental Examiners with the prospect they be turned over to the University of Washington. Another concerns the Director of the Alaska Department of Fisheries going south to attend a conference. Still another concerns opposition to power dams on the Copper River at Cordova because of the potential damage to fisheries.

Q. Is that the one that dealt with the Aluminum Company which is planning to build a dam there?

A. That is right; the proposed Wood Canyon dam. There is one story here that says nearly a million dollars in back wages to go to Alaska Road Commission crews. We [187] did not have that story.

Q. You didn't have that at all? A. No.

Q. Now, I will give you another issue of the Chronicle of December 4, 1953, and ask you if similar articles were marked in there.

(Testimony of Gene Brice.)

A. This is another and more detailed story regarding the Copper River dam. It is almost two columns in length. Another item concerns an appointment by the Territorial Attorney General of an assistant. Still another concerns the Secretary of Alaska working on a list of relief projects for Alaskans. Another item reports the appointment of Doctor Alexander Baird as manager of the Alaska Development Board. A Washington, D. C., item tells of the selection of two Seattle men, one of them a former Alaskan, to be consultants to Secretary McKay.

(Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the witness Gene Brice resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows:)

Q. Mr. Brice, I just have one or two more items, two I want to ask you about; this one in particular. I hand you the front page of the Ketchikan Chronicle of December 1, 1953, with some articles marked in red ink, and ask you [188] if your same testimony applies to those articles.

A. This story concerning a study of Swan Lake as a proposed hydroelectric power project for Ketchikan was in the Chronicle from its Juneau correspondent but was not provided to the Daily News.

Q. It is an item of considerable importance?

(Testimony of Gene Brice.)

A. Yes, it is.

Q. And what else is in there?

A. Here is a Unuk River road study planned soon. This item says that Claire Wilder, former publisher of the Petersburg Press, took over as U. S. Marshal for the First Division today. We did not have that item.

Q. Now, I will hand you an issue of the Ketchikan Chronicle of July 8, 1952, and ask if there is something marked in red in that one.

A. Yes. This concerns General MacArthur's keynote speech at the Republican Convention in Chicago.

Q. Was that sent to the News by the United Press?

A. No, it was not. We had reference prior to the Convention that MacArthur would make the keynote speech, but after he did make it we had no word on it whatsoever.

Q. Now, there is one other issue here that we referred to, the Governors' Convention in Sacramento, where Governor Gruening was present, and he complained about the news dispatches which were sent by the United Press to the [189] Ketchikan Daily News, and, if counsel has no objection that I read that article, that dispatch as it was sent—this refers to the item of the letter Governor Gruening sent, which we introduced yesterday.

"Sacramento, Calif. (U.P.)"—United Press. First I may say, this is in the issue of the Daily News of April 24, 1948.

(Testimony of Gene Brice.)

"Governors of eleven western states and Alaska today asked the federal government to avert a 'serious' power shortage in the west.

"The western governors' conference passed a resolution asking 'sufficient' funds to develop power projects and soil conservation programs. The money for power was requested for multiple purpose flood control, projects already in operation or being planned.

"The resolution also asked the army to allocate at least 6,000 tons per month of anhydrous ammonia, a vital fertilizer base, for use in western plants. Local communities were asked to increase plant capacity for production of ammonia to supply a 'pressing need.'

"Other action by the conference included a unanimous resolution urging statehood for Hawaii, and a request to Congress for a $20,000,000 deficiency appropriations for improvement of forest highways.

"The conference set its next meeting for Salt Lake [190] City, in November.

"Among the governors attending the conference as guests of California's Earl Warren were: Herbert C. Maw, Utah; Mon C. Wallgren, Wash.; John Hall, Oregon; Vail Pittman, Nevada; C. A. Robins, Idaho; Sam C. Ford, Montana; and Ernest Gruening of Alaska."

Mr. Faulkner: Now, if the Court please, I want to ask Mr. Brice one general question.

Q. (By Mr. Faulkner): These clippings here, Mr. Brice, of the Ketchikan Chronicle, I will ask

(Testimony of Gene Brice.)

you if you marked items in red in all of those clippings? A. Yes, I did.

Q. And all of those refer to items of news which appeared in the Ketchikan Chronicle which were not sent to the News by the United Press?

A. They were not sent on this day.

Mr. Faulkner: Now, Mr. Dimond has agreed that we may introduce these altogether, your Honor, instead of taking them up one by one.

The Court: They may be introduced.

Mr. Faulkner: That will make the entire exhibit of those items. I have an envelope here I think will take all these.

The Clerk: That will be Defendant's Exhibit H.

Mr. Faulkner: Exhibit H? [191]

The Clerk: H.

Mr. Faulkner: I think that is all.

Cross-Examination

By Mr. Dimond:

Q. Mr. Brice, this article in relation to Governor Gruening, you were not with the News at that time?

A. No, I was not.

Q. You didn't testify on that particular article?

A. No.

Q. Now, is it your testimony that all of the news articles marked in these clippings which did not appear in the News but which appeared in the Chronicle were not sent to the News by United Press?

(Testimony of Gene Brice.)

A. With the possible exception of two or even three items which may have been left out because of their minor importance on a heavy advertising day.

Q. But you know that the others were not sent to the News, were not received by the News?

A. That is correct.

Q. Do you preserve copies of the teletype transmissions sent to you? A. No.

Q. Now, what are the mechanics of this thing? This thing comes over a teletype; is that [192] right? A. That is a transmission.

Q. This is a transmission. And do you edit the transmission that comes over the teletype?

A. Yes.

Q. And what do you do? Do you tear off a piece that you want in the paper and send it to the printer?

A. I clip it as it comes through the teletype.

Q. In other words, you tear this thing apart as it comes through? A. That is correct.

Q. And you don't preserve those pieces that you take out of this transmission? You don't save this thing? A. No.

Q. Well, how can you testify positively then that United Press on certain designated dates did not include in their teletype transmission one or more of the articles that you said were not included?

A. The situation was such that it was absolutely necessary that I use all wire reports in order to have a presentable newspaper.

(Testimony of Gene Brice.)

Q. You mean you used every bit of this transmission?

A. Yes; with very few exceptions, or in instances where the Associated Press had carried the story the previous day I sometimes cut the story down to a very small item or deleted it. [193]

Q. You testified that you worked for the Chronicle prior to coming to the News? A. Yes.

Q. Do you know how many hours or minutes the Chronicle was receiving Associated Press dispatches? A. One hour and a half.

Q. One hour and a half. And the News was receiving one hour? A. One hour.

Q. Well, don't you think it is possible that with an additional half-hour of news that there would be bound to be more items of news sent to the Chronicle than to the News?

A. They would have more words; yes.

Q. And they might even have more articles?

A. Yes.

Q. With an additional thirty minutes?

A. Yes.

Q. So that might explain some of the instances there where the Chronicle got articles you didn't have in the Ketchikan Daily News; isn't that true?

A. In some instances; but in the majority of them the exhibits will show that the story was released or announced on the preceding day, which would give the United Press ample time to include it in our file.

Q. But the point I am making is that with an

(Testimony of Gene Brice.)

additional thirty minutes of coverage there is bound to be more [194] news sent to the Chronicle than to the News.

A. That is correct; there would be more items.

Q. Did you ever ask the United Press in your time with the Ketchikan News to furnish you with an additional half-hour of news coverage?

A. Not to my knowledge.

Q. Do you recall that United Press ever offered to give the Ketchikan News an additional half-hour of coverage without any additional charge?

A. No, I do not recall anything like that.

Q. After you terminated the contract with United Press in February, 1954, immediately after that you signed up with Associated Press; isn't that true; you started receiving Associated Press reports? A. That is correct.

Q. And how much time did you get from Associated Press? Was it ninety minutes?

A. It was an hour and a half.

Q. An hour and a half a day. At that time or shortly after that had you made any arrangements with one of the radio stations in Ketchikan which was served by Associated Press to get the radio station news copy for publication in your paper?

A. There was no permanent agreement. We asked the Associated Press if it would be all right to get the additional [195] wordage because at times the radio station had items which were not on the news wire, and the Associated Press said that would

(Testimony of Gene Brice.)

be all right because of the communication problem between here and Seattle and the high cost of transmission.

Q. So in some instances you did use the radio station's copy for publication in your paper?

A. In a few instances; yes.

Q. That might account for additional stories; I mean, if the Chronicle had a similar situation, that would account for additional stories there that the News didn't have prior to February, 1954; isn't that true; or, do you know whether the Chronicle had an arrangement similar to that with the radio station?

A. At times the Chronicle would pick up copy from the radio station. It was not regular. It was very irregular.

Q. Did the News ever have such an arrangement when you were being served by United Press?

A. No; because neither of the radio stations took United Press copy.

Q. I think you testified on direct examination that only occasionally was the type of news contained in the United Press August 12th report sent to you by United Press?

A. I said that because it contains an Alaska item and United Press was very lax in sending Alaska items to us. [196]

Q. But you had the same length of transmissions?

A. We had the same number of words; yes.

Q. And, generally, the class of news was the

(Testimony of Gene Brice.)

same throughout the time you were working for Ketchikan News, the type of news that was sent in here?

A. Well, you can't say that because news events change throughout the world from day to day. We received the same number of words.

Q. Which Alaska item are you referring to? Do you recall?

A. I believe at the bottom of the file there is one item involving Alaska.

Q. Now, Mr. Brice, the plaintiff in this action before the trial submitted certain interrogatories to the defendants asking when, or asking for specific instances where plaintiff had failed to furnish an adequate news service, and in answer to that the defendants said: "Answering Interrogatory No. 1, defendants submit the following instances where plaintiff failed or refused to submit to the defendants news of great importance to Alaska and the readers of defendants' paper, which items were published in rival newspapers and which consisted of the following," and then there are sixty-nine separate paragraphs which designate specific dates and items of news that appeared in the Chronicle and not in the News. I think some of those are those which you have identified. [197] Is that true?

A. I really couldn't tell you how many I identified. It seems to me there must be a couple of hundred items.

Q. Well, here are the defendants' answers to the interrogatories of which I spoke, and would you

(Testimony of Gene Brice.)

look at those, starting with No. 1, and tell me whether or not you obtained the information which is contained in those answers?

A. Yes; I did secure those clippings from the file of the Chronicle.

Q. As I recall, some of those clippings are identical with some of the specific instances alleged in those answers. Now, did you help prepare or prepare the information which was contained in those answers? In other words, did you make the comparison between the Chronicle issues and the News issues and pick out items that were not contained in the News but which were contained in the Chronicle? A. Yes, I did that.

Q. And upon which information those answers were based. Can you recall by looking at these?

A. I see some items here that I distinctly recall clipping.

Q. Well, let's take for example Answer No. 16 on Page 4. The defendants allege there: "An article dated August 13, 1953, regarding the call for bids on the construction [198] of 610 miles of pipeline from Haines to Fairbanks, Alaska, which appeared in most all the papers in Alaska except those served by United Press." Do you recall, Mr. Brice, that that pipeline article was not carried by the News?

A. It was not carried by the News on that day.

Q. Could it have been carried on a prior date?

A. No. It could have been carried on a following date.

(Testimony of Gene Brice.)

Q. Is it also your testimony that on—that it was not received by the News from United Press?

A. No, I do not say that it was not received. It is very possible that we could have had an item like this at sometime previous to the marked clipping or sometime afterwards. That is possible. But we did not get what I would consider a good news story on the project at that time, unless it were one of the few items which were deleted because of heavy advertising and a heavy local news day.

Q. I hand you this transmission of United Press report to Ketchikan News of August 12th, which has been introduced as an exhibit, and showing you the article near the bottom which is entitled Washington, D. C., isn't that an article about the Haines pipeline project? A. Yes, it is.

Q. And that was carried on August 12th, according to this heading on this transmission; and yet you testified that [199] a instance of defective service was because the same article wasn't carried on August 13th.

Now, I wish you would refer to Answer No. 20 on Page 4 where the defendants say: "An article on August 25, 1953, regarding statehood activities at Anchorage." Now, is it your testimony that this article was not carried by United Press or not delivered to the Ketchikan Daily News by United Press on August 25, 1953?

A. I don't recall this specific item. I do recall that we had an item saying that a statehood hearing would be held in Anchorage. I do not recall that

(Testimony of Gene Brice.)

we had a story saying that it had been held and what transpired.

Q. Well, then turn to Answer No. 21, Mr. Brice: "An article on August 27, 1953, with reference to hearings before the Senate Committee on Interior and Insular Affairs on the Alaska statehood bill." Are you familiar with that article?

A. No, I would not be too familiar with it. There were any number of articles involving statehood.

Q. Do you know whether or not this article that is referred to in Answer No. 21, that you have read, was an article that was contained in the Chronicle on that date but not in the Ketchikan Daily News?

A. I simply would assume that from comparing the two papers as of that date, but whether it was August 27th I do not [200] recall exactly. It is difficult to recall the dates of the papers from which I made clippings. I simply prepared them. I had a file of the Chronicle on one side and a file of the Daily News on the other and compared the two papers.

Q. I believe you testified previously, didn't you, how those instances of newspaper clippings, with the exception of two or three instances, none of them were carried in a United Press transmission?

A. That is correct. There were a few that United Press may have had but did not have on that date.

Q. Well, can you testify that this article of August 27, 1953, with reference to hearings before the Senate Committee on the Alaska Statehood Bill

(Testimony of Gene Brice.)

was not carried by United Press to the Ketchikan News?

A. Well, from the list of dates here I couldn't say. I would have to see the actual clipping.

Q. Didn't you say you prepared the information from which these answers were made?

A. Yes; but I did not memorize the dates on which these articles appeared.

Q. Is it possible then on August 27th or even a day or two prior to that that the United Press did carry the same story that you refer to here?

A. Yes, it would be possible. [201]

Q. Now, turn to Answer No. 23 on Page 5. It says: "On September 9, 1953, an article regarding a reward offered for the discovery of the wrecked plane of Ellis A. Hall, which was last seen near Ketchikan." Do you recall that story? It was of considerable importance, I presume. I think we all remember the Ellis Hall accident. Now, Mr. Brice, since you prepared the information upon which these answers were based, do you not recall that on September 9, 1953, the Ketchikan Chronicle carried an article regarding a reward for discovery of the Ellis A. Hall plane but the News did not carry such an article? Is that true?

A. That is true as I recall it.

Q. And is it also your testimony that you did not receive such an article from the United Press?

A. To my knowledge and to the exclusion of these few items which on occasion were left out.

Q. Well, then you will not testify that this par-

(Testimony of Gene Brice.)

ticular article on Mr. Hall's plane may not have been sent to you by United Press either on that date or prior to that date?

A. Not that I recall. As I say, I worked these two files. I had the Chronicle file and I had the Daily News file. When you check over dozens of items and dates of them, it is possible that I could have made an error in the [202] date of one on the 11th and possibly the 12th.

Q. Let's turn to, let's skip over to Answer No. 47 on Page 7: "An article dated December 4, 1953, by the Associated Press with reference to relief for indigent fishermen; one by plaintiff's agent referring to power development on Copper River." As I recall your testimony on direct examination, a clipping was identified by you from the Ketchikan Chronicle which contained an article on the power development on the Copper River, which you testified not only was not contained in the Ketchikan News but was not received by United Press report; is that true?

A. That is correct; not as I recall it.

Q. What did you say?

A. I say, not as I recall it.

Q. That is not your testimony? It is your testimony then, isn't it? A. Yes, it is.

Q. I hand you what purports to be a United Press run to the Daily News, Ketchikan, on December 3, and ask you to—excuse me; I have the wrong one—and ask you to note this part marked with a pencil here starting: "Juneau—The Alaska

(Testimony of Gene Brice.)

Fisheries Board and the U. S. Fish and Wildlif Service yesterday told the Federal Power Commis sion they opposed a dam on the Copper River." An here is a story about the Harvey Aluminum Com pany building a dam at [203] Cordova. Isn't tha the story to which you referred in your testimon on direct examination?

A. It sounds familiar—Harvey Aluminum Com pany; yes.

Q. Then the same story was carried by th United Press to the Ketchikan Daily News on De cember 3, 1953, a day earlier than the date com plained of.

Mr. Dimond: I would like to mark this fo identification. (Handing document to Mr. Faulk ner.) I will be through very soon, Mr. Brice.

The Clerk: Is this an exhibit?

Mr. Dimond: I would like to mark it for identi fication. I intend to admit it through the testimon of Mr. Belnap who will identify it, unless there i objection.

The Court: You mean you don't want to offer i as an exhibit?

Mr. Dimond: I will offer it in evidence.

The Court: Now?

Mr. Dimond: Now. But I thought there migh be objection.

The Court: If there is no objection, it may b admitted.

Mr. Faulkner: I don't think there is any objec

(Testimony of Gene Brice.)

tion. I don't think it refers to exactly the same thing that we introduced.

Mr. Dimond: Well, I don't know where this article [204] is, but, as I recall, he testified there was no article in the News of the Copper River dam project on that date. It is somewhere in this file.

Mr. Faulkner: I think the article we introduced on the Copper River Dam was one with a banner headline that the Governor and the Attorney General had protested the building of this dam and several other articles on the front page of the Chronicle regarding the affect on the fish. Isn't that right?

Mr. Dimond: There were two articles on the Copper River Dam, Mr. Faulkner. The one you refer to was on a different date than on this one, which was on December 4th, as I recall it.

A. One was a banner story, and one was a two-column head on the middle of the page.

Mr. Dimond: Well the article on December 4th was an article "Big Copper River Dam Threatens Red Salmon, Says ADF." I think that is the one that the defendants referred to, one by plaintiff's agent referring to power development on the Copper River. That is what the answer says. And the plaintiff can show that on December 3rd an article regarding the power development on the Copper River was sent by United Press to the Ketchikan News.

The Court: Well, are the parties agreed now

(Testimony of Gene Brice.)

that both of these refer to the same item of [205] news?

Mr. Faulkner: No, I don't agree to that. But there were several articles on the Copper River Dam, and I think it is the way they were handled that we referred to there in the Ketchikan Chronicle. They are different articles. I think they touch on the same thing, but what he says they sent to the News on the day before was a little different from what the Chronicle had the day after.

Mr. Dimond: Well, of course, all we can go by, your Honor, in answer to our interrogatories is what they said here—an article on the Copper River Dam—and that is found in this article.

Mr. Faulkner: I don't object to the introduction.

The Court: It may be admitted. If the jury finds that it is material or important, they may make the comparison and draw the conclusion themselves, if it referred to the same event or occurrence.

The Clerk: This is being marked Plaintiff's Exhibit No. 6.

Q. (By Mr. Dimond): Now, Mr. Brice, in Answer No. 62 on Page 9 the defendants allege that there was not sent by United Press to defendants' paper: "An Associated Press dispatch dated January 8, 1954, regarding reduction in Alaska appropriations." Of course United Press would not send an Associated Press dispatch. But is it your testimony that you did not receive on a United Press report either on January 8, 1954, or a day or two

(Testimony of Gene Brice.)

prior [206] to that an article regarding reduction in Alaska appropriations?

A. I do not recall it, to a comparison of the files.

Q. Well, I think, as I recall, on your direct examination Mr. Faulkner handed you this morning an article from the Ketchikan Chronicle regarding Alaska appropriations in the issue of January 8, 1954, and you testified that that report on appropriations was not sent to you by United Press?

A. Does that concern Alaska Public Works and Road Commission Funds?

Q. It was an article dated January 8, 1954.

A. Yes. Well, that mentions Alaska Public Works and Road Commission Funds.

Q. I hand you the original, what purports to be the original, of the United Press run for Daily News, Ketchikan, January 6th, and referring you to an article marked with a pencil, which says: "The Public Works program authorization expires next year although only some $41,000,000 of the original $70,000,000 proposed has been appropriated. The hearing is Feb. 8. A hearing on a bill to increase the limit on lease of school lands" and so on. Isn't that a similar article to the one to which you referred?

A. Well, it is. In that item there are five lines regarding Public Works appropriations, five lines story starts out with [207] the introduction of a bill by Bartlett, and naturally, when I gave that to the printer, my heading would carry the story of in the middle of an entirely different story. That

(Testimony of Gene Brice.)

the introduction of a bill by Bartlett. There is no detail concerning the reduction in appropriations for Alaska.

Q. But you testified that you didn't receive anything from United Press.

A. I didn't receive anything like that from the United Press. You just showed me the five lines, the five lines that we received. We did not have an extended article such as the Associated Press carried.

Q. But you did receive something from United Press? A. You just showed me that.

Mr. Dimond: I would like to offer this in evidence.

The Court: If there is no objection, it may be admitted.

The Clerk: Plaintiff's Exhibit 7.

Q. (By Mr. Dimond): Mr. Brice, I have just one more item for you. You testified on direct examination that the News did not receive from United Press a story which appeared in the Chronicle under date of January 12, 1954, regarding a suicide of a prominent Alaskan named James Barrack. Now, was that your testimony?

A. That was one of the clippings I had.

Q. Well, I hand you what purports to be the original of the [208] 11:00 a.m. United Press run for Ketchikan, January 12th, and show you an article from Seattle regarding the suicide of James Barrack. Isn't that the same subject that you testified on that was not received by you?

(Testimony of Gene Brice.)

A. That is correct.

Mr. Dimond: I would like to offer this in evidence.

The Clerk: Plaintiff's Exhibit 8.

Q. (By Mr. Dimond): There might still have been other instances, Mr. Brice, where there were articles which did not appear in the Ketchikan News, just weren't printed there, and which had been received by them?

A. It is very possible that from time to time an item or two was omitted on a day that was heavy with local news and heavy with advertising.

Mr. Dimond: That is all I have.

Redirect Examination

By Mr. Faulkner:

Q. Mr. Brice, most of the articles you complained of there this morning—there were nearly a hundred—were articles of importance to the readers of the News and important to the people of Alaska?

A. Oh, definitely. They concerned taxes. They concerned Territorial elections. They concerned the reappointment of Territorial officials. As I recall it, the Associated [209] Press carried a story on the reappointment of Governor Gruening as Governor of Alaska, and the United Press did not have that item on that day. I think another item in that regard—the Associated Press carried an item on the reappointment of Judge Folta as Judge for the First

(Testimony of Gene Brice.)

Judicial Division, and the United Press did not carry that item.

Q. And all of these outside of Juneau which are from the special correspondent to the Chronicle which, you say, was sent by the United Press agent, I understand none of those appeared in the United Press service to the News?

A. There may have been one or two, but they were very small items or they were handled in a minor item.

Q. And some of those were items of considerable importance to the people of the Territory?

A. Anything involving taxes, and elections, fishing regulations, are of importance to the people of Alaska.

Mr. Faulkner: I think that is all.

Recross-Examination

By Mr. Dimond:

Q. I have one more question, if counsel please. Do you know, when you were working for the Chronicle, was George Sundborg the stringer for United Press then in Juneau?

A. For United Press? Not to my knowledge. He was a [210] part-time correspondent for the Chronicle.

Q. He was hired by the Chronicle?

A. I would not say that he was hired by the Chronicle; no. He submitted items from Juneau.

Q. To the Chronicle? A. Yes.

Q. And he got paid for those?

(Testimony of Gene Brice.)

A. I assume that.

Q. Since you have been with the Ketchikan News do you have any stringers of correspondents throughout the Territory that submit articles to the Ketchikan News?

A. We subscribed to the United Press when I first went to the Daily News, and the United Press had claimed that it had correspondents in all the major cities of Alaska. We now take the Associated Press, and the Associated Press claims they have correspondents in the major cities of Alaska.

Q. You don't have any special correspondents of your own, say, in Juneau? A. No.

Q. Do you ever get news articles and reports from Juneau, not from Associated Press but from newspapermen, say?

A. If something occurs in Juneau, I simply sit down at the teletype and ask the Juneau Empire if it has any information on that. [211]

Q. When you were with the Chronicle you know that George Sundborg in Juneau submitted articles to the Chronicle?

A. I do not know what articles he submitted. I know that he discussed it with Baker, who is the editor of the Chronicle, and Baker had mentioned to me a couple of times that George Sundborg would be writing for him.

Q. And at that time you were also receiving Associated Press reports ninety minutes a day, weren't you? A. That is correct.

Mr. Dimond: That is all.

(Testimony of Gene Brice.)

Redirect Examination

By Mr. Faulkner:

Q. Mr. Brice, you talked about these correspondents. How does the Associated Press handle the news in Juneau when the Legislature is in session?

A. The Associated Press this year had a teletype set up right in the legislative building, and Jim Hutcheson, a veteran legislative correspondent, covered the session of the Legislature, and he had a teletype which was on a circuit with twenty-two other teletypes in Alaska.

Q. Now, he has done that for a number of years, has he?

A. Hutcheson has covered the Legislature for several years.

Q. Did the United Press ever have such service up there?

A. Nothing in comparison with the Associated Press. [212]

Q. Well, did they have any?

A. We made arangements at one time with Bob DeArmond when he was in Juneau to secure information on the Legislature through him.

Q. Yes; but that was your own arangement, wasn't it? A. That is correct.

Q. That wasn't the United Press arrangement?

A. No, that was not.

Q. So you had to make your own arrangement there? A. That is correct.

Mr. Faulkner: That is all.

(Testimony of Gene Brice.)

Recross Examination

By Mr. Dimond:

Q. As long as we are on this other subject I would like to ask one more question. Didn't you have to pay something additional for that special legislative report from Hutcheson? A. Yes.

Q. How much more did you pay for that news?

A. I don't recall just what the figure was. That was handled through the business office.

Q. Could it have been around two hundred dollars a month or thereabouts?

A. No. I have a faint recollection that it was around [213] eighty-five or eighty-six. I really don't know. That was handled by the business office.

Mr. Dimond: That is all.

(Witness excused.)

The Court: I would like to inquire how the evidence shows that this contract was extended to 1962. I can't fathom that from the evidence.

Mr. Faulkner: I can't either.

Mr. Dimond: I can explain it, your Honor. The service under the contract started on October 3, 1945, and the printed provisions of the contract stated that, irrespective of the date appearing on the contract, the effective date that would govern was the starting time of the contract and that was October 3, 1945.

Now, Paragraph 8 set the initial term of the con-

tract as three years, so there was an extension. The first term of the contract was October 3, 1945, to October 3, 1948. Now, since we contend that no notice of termination was given six months prior to October 3, 1948, the contract was extended by the terms for another five years, which would have brought it up to October 3, 1953, and we also contend that, since no notice of termination was given sixty days prior to October 3, 1953, that——

The Court: Where do you get the sixty days?

Mr. Dimond: Six months. Excuse me, your Honor. [214] Since no notice was given of termination on April 3, 1953, which is six months prior to October 3, 1953——

The Court: Well, but what about the effect of this modification agreement of February 21, 1950?

Mr. Dimond: Well, I am getting to that in a minute. I am trying to make this chronological. The contract was extended from 1953 for five years, until 1958. Now, under the terms of the modification of the agreement entered on February 21, 1950, it was provided that the term of the basic contract would be extended by the length of time that that modification was in effect and that modification permitted either party to give notice of termination, and, if either party——

The Court: I understand all that but I just don't see how you attach this modification contract onto a later extension period. It seems to me that, when you look at this modification agreement, it refers to the current period which would expire in 1953 and that it would extend that period and not the period beginning in 1958.

Mr. Dimond: I would assume it would extend the period at the time the termination of the modification was made, which was February 14, 1954. That is the first time that modification came into effect, that is, the extension of time.

The Court: Well, but that assumes that the current [215] period ending——

Mr. Dimond: February 14, 1954. The expiration date was 1958.

The Court: Yes; provided that there had been a renewal in 1953.

Mr. Dimond: Yes.

The Court: But it seems to me that the renewal was delayed by this modification agreement.

Mr. Dimond: I couldn't see that, your Honor. I thought that the modification of the agreement was that this rate was suspended during this period of time from February 21, 1950, until notice of termination was made on February 14, 1954, and as soon as that notice was given——

The Court: But what did it extend? That is what seems to me the question is. It couldn't have extended a period that hadn't come into being yet. If it extended anything, it would extend the current period.

Mr. Dimond: But the expiration time of the contract in 1954 had been extended by failure to give notice of termination.

The Court: Well, I understand your position, but I can't understand how this modification agreement of February 21, 1950, could, so far as extend-

ing it is concerned, extend anything except the current period, not some future period.

Mr. Dimond: The modification says the term of the [216] agreement between the parties shall be extended by the length of time during which the suspension is in effect. The term of the agreement you get from Paragraph 8 and the facts of the contract. The term of the agreement ended for 1954 in 1958, had been extended already, and, therefore, when this was terminated, it extended it another four years.

The Court: I can't follow that reasoning; I mean, I can follow it, but I certainly can't believe that it——

Mr. Faulkner: I can't follow it either, your Honor, and I have gone on the assumption that that could not be the result of that modification.

The Court: I can't see how it is.

Mr. Faulkner: Where is the contract? The contract is not for fifteen years or ten years or twenty years. The contract runs for three years and then five-year periods unless you give notice. Now, that five-year period, the first one expired in October, 1953. Now, prior to that time, in February, 1950, they bring in this modification and they say the period is extended four years. Well, what period? Why, the then period. They couldn't jump over that and extend another period. They might as well jump to 1970 or 1977. I can't see the language in that that would justify that. This period, the period, now, was to expire in October, 1953. Now, they say they extended that four years. They extended

that during the period this thing is in operation, and Mr. Belnap [217] says that was four years, so, therefore, it would be from October 3, 1953, to October 3, 1957. That is as far as they could go. That is the deadline. But I don't see how in the world they could ever reason that it was 1962.

The Court: Well, it is a question that, of course, I will have to answer before preparing the instructions. That is why I made the inquiry now.

Whereupon Court recessed until 2:00 o'clock p.m., April 14, 1955, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

The Court: I think perhaps for the guidance of the parties I should announce that I have come to the conclusion that, since a contract cannot be suspended and also run at the same time, I have got to limit the period for which any recovery could be had by the plaintiff, if the plaintiff is entitled to recovery, to the period ending September 27, 1957. You may call your next witness. [218]

* * *

Plaintiff's Rebuttal

DAVID F. BELNAP

called as a witness on behalf of the plaintiff, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Mr. Belnap, I believe you testified on direct examination that you have about four thousand clients, United Press does?

A. Four thousand four hundred, approximately.

Q. And the assessments made on account of wage labor agreement increases are the same all over, are they not?

A. That is right; the percentage is the same against the rate of the client.

Q. And this increase in assessments is different from the actual salary of the Seattle operator; is that correct?

A. That is correct. The salary of the Seattle operator, which the defendant agreed to pay, was fixed at a certain amount by mutual agreement. The assessments under Sub-paragraph 2, Article Second of the Agreement, were levied against this client as well as against all the rest of the clients, and they applied to the operators' increases as a whole. I might explain that this way, that, when the United Press negotiates with the Commercial Telegraphers Union and an increase is negotiated in their salaries, all of their salaries, the salary of the [219]

(Testimony of David F. Belnap.)

Seattle operator as well as the salaries of the operators in other cities like San Francisco, Washington, D. C., New York, New Orleans, Chicago, Denver, Salt Lake City. The total increase, the total increase in overhead through that increase in salary to these operators is passed along to our clients in the form of a percentage assessment against their rates, and these assessments would have been levied against the Ketchikan News whether or not it had been necessary for us to employ a specific operator in Seattle to transmit the file to the Ketchikan News.

Q. Is it customary for a person in your position, as an official with a news gathering service, such as United Press, to be familiar with the circulation figures and have access—— A. Yes, it is.

Q. ——to the circulation figures of newspapers that you serve? A. That is correct.

Q. And also of your newspaper competitors?

A. That is correct.

Q. Have you made any comparison from any source of the circulation figures of the Ketchikan Daily News as compared with those of the Chronicle?

A. Well, I have looked up the circulation figures of the [220] two papers in the "Editor and Publisher Year Book"; yes.

Q. What is that?

A. The "Editor and Publisher Year Book" is a standard directory of newspapers in the United States, its territories and Canada, which is published every year in January by the Editor and Publisher

(Testimony of David F. Belnap.)

Publishing Company. That is a company which publishes a newspaper trade publication every week. The directory contains the names of all the daily newspapers in the United States, its territories and Canada, together with certain information about those papers supplied by the papers themselves, the names of the executives of the papers, the names of the publishing company in each case, the advertising rate for the paper, the circulation for the paper, the wire service which serves the paper, and information of that nature, statistical information.

Q. Based upon your research in this respect what have you found as to the comparative circulation of the Ketchikan Chronicle and the Ketchikan Daily News during the period, say, 1949 to the end of 1953?

A. The figures in "Editor and Publisher Year Book" for those years show that the Ketchikan Daily News had a regular, steady rise in circulation rate, or in circulation figures, rather, in average daily circulation, and that in about 1951, having previously had, according to that [221] book, fewer average daily circulation than the Ketchikan Chronicle, in 1951 surpassed the Ketchikan Chronicle and continued to surpass the Chronicle and up until the present day, I suppose.

Q. The Ketchikan News was being serviced by the United Press during those years?

A. Yes, it was.

Q. During the course of handling and supervising transmissions, which you testified you had some

(Testimony of David F. Belnap.)

experience in for several years, did you ever have occasion to hear from newspapers which were being serviced by United Press as to the type of news they wanted and the type they did not want?

Mr. Faulkner: Now, if the Court please, I object to that. The type of news is what Alaskan newspapers want. Mr. Charles' testimony is that he wrote and told them, and Mr. Bowerman in his deposition states the priority of the different classes of news.

The Court: Will the reporter read the question?

The Reporter: "During the course of handling and supervising transmissions, which you testified you had some experience in for several years, did you ever have occasion to hear from newspapers which were being serviced by United Press as to the type of news they wanted and the type they did not want?" [222]

Mr. Dimond: If the Court please, the defense of the defendants here is that an adequate news report, as they conclude the regular news report was made in contrast, was not furnished, and they give as examples of that certain instances where articles, they say, were not sent by United Press and not included in defendants' paper, and I think it can be shown as a matter of editorial judgment as to whether a particular item on a certain day was worthy of being included in a 3,500-word transmission. Mr. Belnap has had experience in those things. This is a preliminary question. I want to eventually ask him what his editorial judgment would be on transmitting a

(Testimony of David F. Belnap.)

number of items which the defendants in these newspaper clippings in answer to our interrogatories gave as instances of what they call news of great importance to Alaska and the readers of defendants' paper which were not published, and I think he is certainly qualified—he has already testified as to his experience—he is qualified to give his opinion as to whether these items were of great importance or not.

The Court: There isn't any question about that, but that isn't the objection. The objection is that you are seeking to elicit from this witness the opinion of other newspapers, and, of course, over objection that kind of evidence can't be——

Mr. Dimond: I will restrict the question to newspapers in Alaska. [223]

The Court: It wouldn't change the complexion of the objection or the question either. In other words, here is an attempt to put in, you might say, hearsay testimony, that is, evidence consisting of what other newspapers are said to have reported to him, and, while the Court would permit it and the jury could give it such weight as it saw fit to give it if there were no objection, over the objection I can't admit it.

Q. (By Mr. Dimond): Well, Mr. Belnap, have you read and considered the items mentioned in the defendants' answers to the plaintiff's interrogatories where they cite specific instances that they claim that news items of great importance were not included in the file to the Ketchikan Daily News?

A. Yes; I have read all of the answers.

(Testimony of David F. Belnap.)

Q. You were here this morning when Mr. Brice testified specifically as to some of those items?

A. Yes, I was.

Q. Which were introduced in evidence as defendants' exhibits here? A. Yes, sir.

Q. Now, one of those items, in answer No. 8 of the answers to the interrogatories, dealt with the death of a Coast Guard enlisted man. Would you say that in your experience that in the case of transmission of teletype service [224] to the Ketchikan Daily News for one hour a day that an item concerning the death of a Coast Guard enlisted man would ordinarily be included?

A. Well, it would depend to a large extent on who the Coast Guard enlisted man was. If the Coast Guard enlisted man was Clark Gable, yes, it would be included. If the Coast Guard enlisted man was Joe Smith of Keokuk, Iowa, why, it would have been a waste of Mr. Charles' transmission time in transmitting that. And it would depend too largely on the rest of the news of the day. He might be someone other than Joe Smith of Keokuk, Iowa. He might be a college professor who was in the Coast Guard on a tour of duty and during that tour of duty he was drowned. It would depend on the specific story, and there isn't enough information just in a line saying "Death of a Coast Guard enlisted man by drowning" to be able to tell just exactly whether that was a news item of great im-

(Testimony of David F. Belnap.)

portance or not. I would say that, if that is as well as it can be described there, it probably wasn't.

Q. Would that be true of some of the other answers too?

A. Yes; that is right. All of the answers were quite vague, and it was certainly difficult to see just exactly what they were referring to.

Q. What do you use as a basis for the transmission, the news that should be included in a one-hour transmission? [225]

A. Well, it depends on the news that is happening in the world that day. It depends on whether president so-and-so of France has been assassinated. That is a big story. It depends on whether you have the Korean War going on. That is a big and important story, a story in which the readers of Alaska are interested. If you have to choose between the death of a Coast Guard enlisted man and the current situation in the Korean War, no, you wouldn't include the death of the Coast Guard enlisted man.

Additionally, you have to take into account certain classes of news. For instance, we were required to file to Mr. Charles a minimum budget of sports which required a certain period or portion of that one-hour, thirty-five-hundred-word transmission—baseball scores, results of fights, heavyweight fights, and the results of other top sporting events. It was necessary to furnish to Mr. Charles in that file reports on the doings of Congress in Washington. That is important. It is necessary, to publish a bal-

(Testimony of David F. Belnap.)

anced newspaper, to have sports and to have reports on Congress and to have reports on the Korean War and to have reports on the important things that are happening around the world, things that are affecting us right here in the United States, about the cold war and about Russia.

News, again, as I say, is relative. It is [226] different every day, actually. A story that today might be quite important tomorrow isn't, because there is so much more news of more importance and of more significance that the other previous day's top story is paled by comparison and, as a consequence doesn't merit the same consideration and is a matter on which a decision must be made every day.

Q. Mr. Belnap, did you observe during Mr. Brice's testimony and from reading the defendants' answers to plaintiff's interrogatories of October 2, 1954, relating to the items of defective news service, that several, if not many, of the items related to stories sent by what was called the United Press representative in Juneau?

A. Yes, sir; I noted that.

Q. Who was George Sundborg at that time?

A. Who was at that time George Sundborg.

Q. What were his duties with respect to United Press?

A. George Sundborg's duties with respect to the United Press were to furnish us at Seattle by telegraph, as a rule, news items from Juneau, Alaska, of general interest.

Q. What do you mean—"of general interest"?

(Testimony of David F. Belnap.)

A. I mean news items which we can use on our wires, news items that are worthy of being included on our wires, and George Sundborg, I might say, did supply us with news items of that nature, and they were carried on our wires, [227] including the wire to the Ketchikan Daily News.

Q. Was that supposed to include all the local items that might be of local interest to a Ketchikan newspaper? A. No.

Q. Why not?

A. Well, for one thing, the file to the Ketchikan Daily News wouldn't have encompassed the size of the file that Mr. Sundborg was turning into the Ketchikan Chronicle as a special correspondent for the Chronicle. It would have been out of balance.

Q. Was there any agreement ever made between you and the United Press and the Ketchikan Daily News to furnish a special local news service such as Sundborg might have been furnishing the Chronicle? A. No.

Q. Mr. Belnap, I hand you what purports to be a copy of a letter from the Ketchikan Daily News, dated April 8, 1946, addressed to Pierre A. Miner, United Press Associations, New York City, and signed by Sid D. Charles. Can you identify this letter and tell me where you have seen it before, if you have seen it?

A. Yes. This letter is from the Seattle correspondence files.

Q. Are you in charge of and do you have custody of those files? A. Yes, I do. [228]

(Testimony of David F. Belnap.)

Q. And you picked this letter out of those files?

A. I picked this letter out of our files in Seattle.

Mr. Dimond: If the Court please, I have several letters here that I wish Mr. Belnap to identify, of which some parts are not particularly relevant, but each of them contains some expression of satisfaction of the service, from the News to the United Press Association, which I think is material in view of the defense.

The Court: Well, what is it you wish to have done now?

Mr. Dimond: Well, I would like to introduce all of these letters. I just don't know whether to have them identified separately or show them to counsel first.

The Court: No, you don't need to have them identified. You can show them to counsel.

(Mr. Dimond handed documents to Mr. Faulkner.)

Mr. Dimond: They are dated from April 8, 1946, to April 16, 1949. I would like to offer these letters in evidence.

The Court: They may be admitted.

The Clerk: As a group?

Mr. Dimond: Yes.

The Clerk: This will be Plaintiff's Exhibit 9.

Mr. Dimond: If the Court please, ladies and gentlemen of the jury, I don't intend to read these letters in full [229] now, but each of these letters

(Testimony of David F. Belnap.)

dated from April 8, 1946, to April 16, 1949, signed by Sid Charles of the Ketchikan News, in one or two paragraphs contains expressions of satisfaction with the type of service that United Press was rendering at that time, and, rather than burdening you with reading them in full, I shall merely keep them here as an exhibit which you will have a chance to refer to later on. That is all I have, Mr. Belnap.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Belnap, there were some instances where there was quite important news developed in Alaska and in the transmission was not sent by United Press, weren't there?

A. There may have been instances; yes; I mean, Mr. Brice testified that there were; I don't admit that there were.

Q. And Mr. Sundborg's news sent down from Juneau that you saw this morning or heard of was quite important, wasn't it, locally?

A. Well, I—it would be hard to say. I mean, I am of course using, as I think about it, I am measuring the item against the possible other world news developments that day and taking into account at the same time the limitations of the 3,500-word file, and so it is a relative matter. It is a consideration of each individual item. [230] If I knew what news there was everywhere for that day, I could probably give you my opinion on it.

(Testimony of David F. Belnap.)

Q. But news of matters of taxation and employment security, appointment of important government officials, and water power development, all those things are news of first importance to a Ketchikan paper, aren't they?

A. Well, I just wouldn't be qualified to say.

Q. Now, you heard the answers that the plaintiff United Press made to interrogatories that I presented, which I read this morning, in which they said they had correspondents in practically every town from Ketchikan to Kotzebue. What were those correspondents doing, do you know?

A. You mean, how were they employed in each individual——

Q. What were they furnishing in the way of news?

A. Well, each of those correspondents—now, I can't—do you want their names?

Q. No; we don't need their names.

A. Each of those correspondents had a responsibility. Each of those correspondents had been instructed by us to furnish us with news of general interest in their territory, and of course we had to rely upon their judgment to a large degree whether the news was of general interest and when to file it, since we weren't right on the scene and couldn't say, "Well, this news has just happened. Please send it to us." [231]

Q. Could you point out anywhere in these news items, or in the service that the Associated Press

(Testimony of David F. Belnap.)

gave to the Ketchikan News, any items coming from any of those places?

A. Oh, if I had the complete file of our transmissions to the Ketchikan Chronicle, or Ketchikan News, with me here, yes, I could point out several items every day that were received, or a number of items a week that were sent.

Q. Mr. Belnap, you saw, you have heard, read or saw the item in the Ketchikan Chronicle which I introduced this morning, the Chronicle dated July 2, 1952, referring to General MacArthur's speech at the Republican National Convention, which the Ketchikan News did not carry?

A. Yes; I heard that.

Q. You didn't find any record of the transmission of that item to the Ketchikan News, did you?

A. No, sir.

Q. Now, I have here a file mentioned this morning, something about whether you carried these things; I have a file of the Ketchikan Daily News from June 30th on—July 1st, July 2nd, July 3rd—which would cover that entire period. Now, would you like to look those over to see if there is any mention of General MacArthur?

A. I will be delighted to take your word, sir, that there is not any mention in there.

Mr. Faulkner: I would like to offer these [232] in evidence to clear up that point.

Mr. Dimond: What year is that?

Mr. Faulkner: Well, it was 1952. We introduced the Chronicle this morning to show the large item

(Testimony of David F. Belnap.)

about General MacArthur making the keynote speech, and Mr. Brice said that was not sent to the News. Now, we have the copies of the News here, and I will offer them in evidence, if the jury wants to took for it, as Defendants' Exhibit—whatever it is.

The Clerk: Exhibit I.

Q. (By Mr. Faulkner): Mr. Belnap, just one other question. You said you have looked at the "Editor and Publisher" for the years 1949 to 1953 and you found that the circulation of the Ketchikan News increased from 1951 on; is that true?

A. The circulation of the Ketchikan News is not reported in "Editor and Publisher" for the years 1945 through 1947. I think that the first time that the Ketchikan News circulation was listed in the "Editor and Publisher" was in the year book issue of January, 1949, the figure being the average daily figure for the year 1948, and from that date on there is each year in the year book carried an average daily circulation figure for the Ketchikan News. Those figures show an increase each year from the previous year. [233]

Q. From what year? A. From 1948.

Q. 1948?

A. Yes, sir; in the 1949 through 1954 year books.

Q. I thought you said it increased from 1951.

A. What I said, sir, was that in the year 1951, apparently, the Ketchikan News surpassed its competitor the Chronicle in average daily circulation.

(Testimony of David F. Belnap.)

Q. And continued to surpass them. Now, those figures for the circulation are set up by the News in answer to an interrogatory. I don't think I read it, but it is in answer to an interrogatory.

A. That is correct; and the figures listed in your answers to our interrogatories both correspond to the same figures in the "Editor and Publisher" every year except 1948.

Q. Now, when the News began to pick up in circulation, did you ever notice that that corresponded with the coming of the pulp mill in Ketchikan, the increased activity here?

A. I hadn't connected the two; no, sir.

Mr. Faulkner: That is all, Mr. Belnap.

Mr. Dimond: That is all. [234]

* * *

The Court: Perhaps I should announce that I find against the defendants so far as their first affirmative [239] defense is concerned and also the third affirmative defense. You may proceed then with the argument.

Mr. Faulkner: We will ask an exception to the Court's ruling on that finding.

(Whereupon respective counsel made their arguments to the jury; and thereafter respective counsel were furnished copies of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury; and the following occurred:)

The Court: Are there any exceptions?

Mr. Dimond: I have one exception, your Honor.

(Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred:)

Mr. Dimond: I just want to take exception to part of Instruction No. 4 which instructs the jury to the effect that the term of the contract would expire September 27, 1957, rather than September 27, 1962.

Mr. Faulkner: I would except to the failure of the Court to instruct the jury, if any damages are recovered, they must be limited to the difference between $38.17 and $8.66 a week.

(Whereupon respective counsel and the court reporter withdrew from the bench and were again within the hearing of the jury; the bailiffs were duly sworn to tke charge of the jury, and the jury retired to the jury room at 4:45 o'clock [240] p.m. in charge of the bailiffs to deliberate upon a verdict.)

(Thereafter, on the 21st day of April, 1955, at 4:00 o'clock p.m., at Juneau, Alaska, the above-entitled cause came on for further hearing; the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by John H. Dimond, its attorney; the defendants appearing by H. L. Faulkner, their attorney; and the following proceedings were had:)

Mr. Faulkner: If the Court please, in this case we each have a judgment to submit. I have one

prepared. I didn't file it. I served a copy on Mr. Dimond, and he served a copy of his on me, so I will give it to the Court.

The Clerk: Is yours in the file, sir?

Mr. Dimond: I don't know whether I wish to submit it until I have a chance to argue this matter.

Mr. Faulkner: Do you want to argue it?

Mr. Dimond: If the Court please, I would like to explain that I have prepared a form of judgment, which I served on counsel, which is essentially the same as his except that in mine plaintiff requests that costs and attorney's fees be allowed to the plaintiff rather than the defendants, and the judgment recites that the action having been tried and a general verdict for plaintiff duly rendered and so on.

This afternoon, giving this thing a little [241] more thought, I thought to myself that I probably should not present this form of judgment because it is not the form that I think the plaintiff ought to submit, and that leads me up to a request—I don't intend to take counsel by surprise here; I just wanted to mention this to be brought up later—a request that the Court enter its own findings of fact and conclusions of law in this case and direct that an appropriate judgment be entered which would recite the fact that the jury was merely advisory, and the Court, whatever decision it made, would make its own findings and conclusions.

I base this request upon the contention of plaintiff that it was error to call a jury trial over objec-

tions and on the Court's own motion. I don't intend to argue that at this time, but the reason I mention it at this time is the fact that I intend to file on behalf of plaintiff a motion for a new trial, in a day or two, and I am going to incorporate in that motion a request that the Court open and set aside whatever judgment it enters at this time and make its own findings and conclusions of law and direct the entry of its own judgment, and for the reasons that I have stated, inasmuch as that question will probably be argued and I want to give counsel a chance to prepare himself on the argument, I don't intend to argue it at this time. The only reason I mention it again is the fact that Rule 26 of the Local Rules requires counsel for the successful party to present within two days [242] after the Court's determination of a matter proposed findings and conclusions, and I request that this rule be waived in this case in view of the fact that it would be fruitless for me at this time to present findings for the Court's entry until we have had a chance to argue this question as to whether or not the Court should make its findings. The contention I am making, which I will be prepared to argue at the time we argue the motion for a new trial, is that under Rule 52 the Court is obligated to make its own findings and conclusions and judgment by reason of the fact that this jury was advisory only, and I don't know how binding this rule is as far as the two-day rule is concerned. I would like to argue this matter of the findings and conclusions next week sometime. I have not prepared any to submit to the Court:

The Court: Well, I am just wondering whether you should argue them at all. You may of course argue any motion for a new trial, but the reason I think it would be futile to argue that the jury may be treated as advisory is because, if I am not mistaken, the law doesn't provide for an advisory jury except in actions of an equitable nature. There is no authority whatever for empanelling an advisory jury except in an equity action.

Mr. Dimond: I would have to do a little more research on that, your Honor.

The Court: Well, I am sure of that, because there [243] have been times when I would like to have had an advisory jury in a law case.

Mr. Dimond: Well, I have one case that I cited in court in Ketchikan on this point, but I would like to check it again to see whether it is applicable. But on this question of costs here Rule 54(d) provides that costs shall be allowed of course to the prevailing party unless the Court otherwise directs. In general I think the party in whose favor a judgment is rendered is the prevailing party, and, although plaintiff may not obtain all the damages which he seeks, if the verdict is in his favor, or any damages, even though it is offset by the exact amount in the counterclaim, I think and I submit that he is the prevailing party and, therefore, entitled to costs and attorney's fees under the Rules of the Court. There is very little to say on it except that we submit the plaintiff is the prevailing party.

The Court: Well, but is there no authority on a situation of this kind?

Mr. Dimond: Well, there is authority in Moore's Federal Practice—I don't have the exact citation; I have it but I can't find it now—under his discussion of what is a prevailing party under Rule 54(d), and I would like to refer the Court to one case, a Circuit Court case, found in 35 F.2d at Page 211. The name of plaintiff is Harlan Coal Company, and I didn't get the name of the defendant down. I did this [244] rather hastily. So I submit on the basis of, just on the plain wording of the Rule, and on what Mr. Moore says about it on this case, that plaintiff is entitled to costs and attorney's fees.

Mr. Faulkner: If the Court please, first, on the matter of the advisory jury, if that is before the Court, I just want to say this. I have thought about that myself in connection with this case. There is no provision for an advisory jury in a lawsuit, and, if there had been and this had been an advisory jury, the trial would have taken on a different complexion because the Court would have then submitted to the jury certain questions and certain findings for them to make, and I believe it would have been much easier for the defendant if that had been done, but that is not the way you do in a lawsuit. The jury was empanelled and tried the issues raised by the pleadings, and the pleadings on behalf of the plaintiff claim damages in the sum of $21,000.00. The question for the jury was whether or not the plaintiff was entitled to the damages or whether or not the defendant was entitled to the counterclaim.

Now, the rule on that—I suppose the Court is familiar with it—but the Rule 54(d) says that the costs are allowed to the prevailing party unless the Court otherwise directs. Now, for that reason, because of that clause in the rule, I think you will find very few court decisions defining who is [245] the prevailing party, because the Court tries the case and it is naturally in the discretion of the Court as to who shall have the costs.

Now, I do find though an authority here. I have prepared a little memorandum on this which I will give to the Court to save time.

In the case of B. B. Chemical Co. v. Cataract Chemical Co., 2 F.R.D. 159, the District Court for the Northern District of New York held that the Court had discretion as to awarding costs on counterclaim where the defendant prevailed in the main action, even though the plaintiff prevailed on a counterclaim. It is kind of a reverse situation here.

There are numerous cases cited in 28 USCA on Rules of Civil Procedure, under Rule 54, and in Barron & Holtzoff.

Now, let's see what was done in this case. The plaintiff sued for $21,000.00 The defendant came in and claimed that there was nothing due the plaintiff and set up a counterclaim. Now, I think the Court will remember from the evidence as it was introduced and from the pleadings that this counterclaim was known to the plaintiff at the time it brought the suit. It was for money which it had

drawn after the contract was terminated on drafts of the defendant for the period of, I think, six weeks. Well, if they didn't know it or had overlooked it, we called it to their attention by setting up the counterclaim, and even then they didn't admit that this [246] counterclaim was due the defendants. They skirted around it by saying they didn't owe the defendants anything, so I think it is the effect of a general denial, and, when we confronted them with the drafts, of course, then they admitted that the counterclaim was due, and, being due, it should have been deducted from the amount they sued on.

Now, what did the jury do? They went out and they found a verdict which sounds rather puzzling, but the way the Court submitted it to them I can see just what happened, that they were told to find a verdict, if they found for the plaintiff, in the sum of blank dollars less the sum of the counterclaim, which was $368.70, so the jury, I suppose, felt that they couldn't very well fill in nothing in that blank space and deduct $368.70 from nothing, so they filled in the same amount, thereby giving the plaintiff nothing. Now, it is true that they offset the counterclaim some way or other. I don't know just how they reasoned it, but I think it was the form of verdict that perhaps misled them a little bit. I didn't notice it, and I know the Court didn't notice it until it came in from the jury.

Now, surely, the defendant is the prevailing party in this case. Here the plaintiff sues for a large sum and gets nothing. We didn't sue them for the

counterclaim. We just set it up, the counterclaim, in this suit when they sued us for $21,000.00. I think it would be pretty farfetched to [247] hold now that the plaintiff is the prevailing party. They sued us, and the case was fairly tried and submitted to a jury, and the jury found, while they found that they were entitled—there was no logic or no reason or nothing on which they could base that verdict of $368.70, except to offset the counterclaim, and what they apparently intended to do was give the plaintiff nothing and the defendant nothing, which was satisfactory and which was the result of the case.

Now, as I say, these authorities, I think the Court will find, wherever you look, I think, will not go into that to any extent because of that provision in the rule which makes it at all times in the discretion of the Court. Now, here is a case that I did find, 176 F. 2d 1, Chicago Sugar Co. v. American Sugar Refining Co., which discusses somewhat briefly the matter of costs. It says: "As we understand it, the denial of costs to the prevailing party" —now, even if they were the prevailing party, there would be a reason for denying costs—"the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case." He cites a large number of cases there. "A party, al-

though prevailing, would be denied [248] costs for needlessly bringing or prolonging litigation."

I think that same reason would apply to this case even if technically, because of the jury's insertion of that small amount there, which is offset by our counterclaim, even if technically they could say that the plaintiff still is the prevailing party, and, while they did not call any unnecessary witnesses or didn't prolong the trial unnecessarily, none of those things happened, but they did sue the defendant for a large sum of money and brought them into court to defend when we showed, I think, to the perfect satisfaction of the jury that the contract which they had had been violated on their part; so, if the Court could possibly hold that the plaintiff is the prevailing party in this case, why, I am sure in the exercise of discretion the Court would almost have to hold that the defendant is entitled to costs. Now, our costs is not very much. They are only twenty dollars with the exception of attorney's fees, whatever the attorney's fees might be, and that, of course, would be left to the discretion of the Court.

I will give you this memorandum, Judge, and I will give Mr. Dimond a copy.

Mr. Dimond: If the Court please, briefly, I would like to dispose of this reiteration to the counterclaim all the time. The plaintiff admitted all the allegations of the counterclaim, and that was settled, and the Court instructed [249] the jury to that effect, so that should not be brought into this issue at all.

There aren't too many cases on this subject. The

case that I cited to the Court is a case where the de
fendant recovered more on his counterclaim tha
plaintiff recovered in the verdict for the plaintif
and the Court held there that the defendant was th
prevailing party, and that seems reasonable; if th
defendant gets more than plaintiff, he is the prevail
ing party. But we have a draw here as far as th
damages are concerned. I suppose the only thing t
look at is that the scales are tipped a little bit to
ward the plaintiff's side because he got a verdict. I
other words, the jury found a breach of contract o
the part of the defendant. They didn't want t
award any damages to the plaintiff, but they di
find a breach of contract, and in that respect th
plaintiff did prevail. It prevailed certainly mor
than the defendant did.

Now, the discretion of the Court, of course, state
an equitable principle. The Court can do pretty
much what it pleases here. If it thinks in equity
that the costs should be divided up or should b
awarded one way or the other, I suppose this is
matter of discretion and seldom can be interfere
with on review. But I would like to urge the Cour
in that regard in its discretion to consider the plain
tiff as the prevailing party even though it came ou
of this case [250] with no damages in dollars and
cents because it was the prevailing party in th
sense that it won the case. It sustained its allega
tions in the complaint that there had been a breach
of contract and sustained its defense to the defens
of the defendants that it had in turn breached it
own contract. The jury apparently found that plain

tiffs had performed their contract satisfactorily and that defendants had not.

The Court: Well, I don't know how the jury could have been confused by the forms of verdict if they read the instructions. I don't know how I could have made it any different. I instructed them that, if they found for the plaintiff, they would have to deduct $368.70 because it was admitted that the defendants had that coming on their counterclaim, and I instructed them that, if they found the converse, they would return a verdict for the defendants. It is obvious that what the jury wanted to do is not allow either party anything, and it seems to me we have got to disregard the form of their verdict and view it as merely a device to award nothing to either party, and, viewing it that way, then who is the prevailing party?

Mr. Dimond: Well, if you view it that way, your Honor, I suppose that each party would have to pay its own costs, but I don't want to consent to that.

The Court: Well, I am inclined to think that each party should pay its own costs. I have felt that way from the [251] time that the verdict was returned and noting that it was merely a device to avoid awarding anything to either party, so it will be the order of the Court that each party will pay its own costs.

(End of Record.) [252]

Reporter's Certificate

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporte for the herinabove-entitled Court, do hereby cer tify:

That as such Official Court Reporter I reporte the above-entitled cause, viz., United Press Associa tions, a corporation, vs. Sidney Dean Charles, Pau S. Charles, Patricia Charles, and the Pioneer Print ing Company, a corporation, No. 7031-A of the file of said court;

That I reported said cause in shorthand and my self transcribed said shorthand notes and reduce the same to typewriting;

That the foregoing pages, numbered 1 to 252, bot inclusive, contained a full, true and correct tran script of all the testimony and proceedings at th trial of the above-entitled cause, to the best of m ability.

Witness, my signature this 11th day of August 1955.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: Filed August 11, 1955. [253]

PLAINTIFF'S EXHIBIT No. 1

In the District Court for the District of Alaska,
Division Number One, at Juneau

Civil Action No. 7031-A

UNITED PRESS ASSOCIATIONS,

Plaintiff,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES and PATRICIA CHARLES, and the PIONEER PRINTING COMPANY, a Corporation,

Defendants.

PLAINTIFF'S REQUEST FOR ADMISSIONS

August 18, 1954

Plaintiff requests defendants, within ten days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections as to admissibility which may be interposed at the trial:

1. That a copy of a letter dated August 9, 1945, addressed to Sidney D. Charles, Ketchikan, Alaska, and signed by Edwin Moss Williams, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants, or any of them in due course.

2. That a copy of a letter dated June 30, 1945, addressed to Mr. Sidney D. Charles, Ketchikan,

Alaska, signed by Murray M. Moler, and bearing the signature of Sid. D. Charles under the words "Accepted by" in the lower left-hand corner of said letter, is a true and genuine copy of the original letter bearing the same date, that it was received by defendants, or any of them, in due course, and that it was "accepted by" the defendant, Sidney D. Charles.

3. That a copy of a letter dated September 4, 1945, addressed to Mr. Sid D. Charles, Ketchikan, Alaska, and signed by Dan Bowerman, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants, or any of them, in due course.

4. That a copy of the letter dated September 8, 1945, addressed to Mr. Dan Bowerman, San Francisco, California, and signed by Sid D. Charles, is a true and genuine copy of the original letter bearing the same date and that it was written on behalf of defendants, or any of them, in this cause.

5. That a copy of the letter dated March 21st, 1946, addressed to Mr. Sid Charles, Ketchikan, Alaska, and signed by P. A. Miner, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants, or any of them, in due course.

6. That a copy of the letter dated on April 8, 1946, addressed to Pierre A. Miner, New York City, and signed by Sid D. Charles, is a true and genuine copy of the original letter bearing the same date and

that it was written on behalf of the defendants, or any of them, in this cause.

7. That a copy of the letter dated April 11, 1946, addressed to Mr. Sid D. Charles, Ketchikan, Alaska, and signed by P. A. Miner, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants, or any of them in due course.

8. That a copy of the letter dated October 9, 1946, addressed to Mr. Sid Charles, Ketchikan, Alaska, and signed by Dan Bowerman, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants, or any of them, in due course.

9. That a copy of a letter dated October 12, 1946, addressed to Mr. Dan Bowerman, San Francisco, California, and signed by Sid D. Charles, is a true and genuine copy of the original letter bearing the same date and that it was written on behalf of the defendants, or any of them, in this cause.

10. That a copy of the letter dated January 7, 1950, addressed to Mr. Sid D. Charles, Ketchikan, Alaska, and signed by Fred J. Green, is a true and genuine copy of the original letter bearing the same date and that it was received by defendant, or any of them, in due course.

11. That a copy of the letter dated February 6, 1950, addressed to Mr. Sid D. Charles, Ketchikan, Alaska, and signed by Fred J. Green, is a true and

genuine copy of the original letter bearing the same date and that it was received by defendant, or any of them in due course.

12. That a copy of the document entitled "Modification of Agreement," dated February 21, 1950 and signed on behalf of the Alaska Fishing News by Sid D. Charles, and on behalf of United Press Associations by Jack Bisco, is a true and genuine copy of the original "Modification of Agreement," and that it was executed on behalf of Alaska Fishing News by defendant Sid D. Charles.

13. That a copy of the letter dated February 13, 1951, addressed to Mr. Sid D. Charles, Ketchikan, Alaska, and signed by Harry Carlson, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants or any of them, in due course.

14. That a copy of the letter dated January 18, 1954, addressed to Mrs. M. J. Flood, Ketchikan, Alaska, and signed by David F. Belnap, is a true and genuine copy of the original letter bearing the same date and that it was received by defendants or any of them, in due course.

15. That a copy of the telegram dated February 15, 1954, addressed to David Belnap, and signed by Paul S. Charles, is a true and genuine copy of the original telegram bearing the same date and that it was written and sent on behalf of the defendants, or any of them, in this cause.

Dated at Juneau, Alaska, this 17th day of August, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Alaska Fishing News
Ketchikan, Alaska

June 30, 1945.

Mr. Sidney D. Charles,
Editor and Publisher,
The Alaska Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

With reference to an agreement made between us today for United Press News Service to the Alaska Fishing News, it is mutually understood that as a condition to execution of such agreement, an authorized officer of United Press will write you confirming that the following understandings are integral parts of said agreement:

1—That the service mentioned in Clause One thereof shall consist of one hour of teletype service, daily from Seattle over facilities of the Army Signal Corps, tolls to be paid by Publisher and teletype to be furnished by United Press.

2—That a teletype machine will be installed a soon as possible and services started on a basis c one hour of service on each of the three days pe week on which The Alaska Fishing News is pul lished. Such service will continue on a thrice-weekl basis until The Alaska Fishing News begins dail publication, upon which time all terms of The Agree ment will become effective. For the thrice-weekl service, the Publisher will pay The United Pres the sum of $32.17 weekly and also pay the Signa Corps tolls.

Sincerely yours,

/s/ MURRAY M. MOLER,
Alaskan Representative,
United Press.

Accepted by:

/s/ SID D. CHARLES.

Airmail

September 4, 1945.

Mr. Sid D. Charles,
Ketchikan Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

This will answer the questions in your Augus 28 letter to Mr. Williams concerning possibility c teletype service to the Fishing News.

As you know, we proposed to absorb the operator's salary ourselves for the first six months of teletype service. At the end of the six months, if we had not succeeded in getting additional Alaska business to help carry the operator cost, we wanted you to have your option of bearing the cost thereafter, or of changing over to your present type of service.

Minimum weekly salary for an operator is $52.50. They get wage increases based on seniority so that the exact cost would be higher in the event an operator with lots of seniority bid in the job.

However, we are willing to peg the cost to you at $52.50 a week, absorbing any loss over that amount ourselves. As we added other clients in Alaska, of course, we would prorate the operator cost among them, so that the cost would decrease to you.

The cost of your present type of service, filed six days a week instead of the present three days, plus airmail followup would be $20 a week, tolls collect.

I had hoped to have Murray Moler call on you again before this, but the unexpectedly—sudden capitulation of Japan required that he cover the occupation of Northern Japan, and it's hard to say now when he'll get back to the Alaskan mainland. I would appreciate it if you'd drop me a letter letting me know whether you wish to proceed with tolls—collect press until such time as we can line up other Alaskan business, or whether you wish to go ahead with teletype, with us absorbing the oper-

ator loss for the initial six months, and you abso
ing it thereafter.

Sincerely yours,

DAN BOWERMAN.

March 21st, 1946

Mr. Sid Charles,
The Alaska Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

Teletype service was started to the Alaska Fi
ing News effective October 3rd, 1945. As you w
recall, we agreed to pay the Seattle operator duri
the first six months of this service and that
month period expires on April 3rd, 1946.

In accordance with your letter of September 8
you advised our Mr. Bowerman that if at the end
six months you decided to continue the teletype se
ice, you would assume the operator charge of $52
weekly; otherwise you would reduce the form
service. Even though we have not been able, as y
to develop any further Alaska teletype business,
are willing to continue our arrangement, you to
sume the operator charge of $52.50. As a matter
fact, due to a new contract with the Commerc
Telegraphers' Union, the cost of the operator
risen so that it is now costing about $80.00 a we

However, we are willing to stand by our agreement with you at the figure of $52.50.

Will you please air mail me your reply? We will have to advise the operator and place the necessary orders if you want to discontinue the teletype service.

Sincerely yours,

P. A. MINER.

PAM:IR

The Ketchikan Daily News

April 8, 1946.

Pierre A. Miner,
Assistant Commercial Manager,
United Press Association,
General Office,
News Building,
New York City.

Dear Sir:

Your letter of March 21 at hand. While expressing appreciation for the six months reduced service, and also for your offer of $52.50 instead of $80 per week extra, we are in the position of being penalized because the United Press has no other Alaska connections. Our competitor here taking AP divides his costs with other stations.

The radio station manager here prefers the UP and we tried again to arrange with him a switch

from AP to UP, but were told that Kraft, i
Juneau, owner of the stations here and in Juneau
wanted a rate lower than UP cared to furnish
Naturally we have to see our rival get any advan
tage, as the competition is sharp. There is "grape
vine talk" that Captain Austin E. Latrop is goin
to put a newspaper plant in Anchorage. We can onl
hope that with Alaska expanding, UP will be o
the job and cut in on more patrons to share th
cost with us.

Will state that your Seattle office is very coopera
tive. By the way, wish hereafter to secure with th
report leading stocks, also will want baseball score
of major leagues later. Am enclosing a sample o
stock quotations in condensed form. Should I writ
the Seattle office or will you so instruct them?

Your very truly,

THE DAILY ALASKA
FISHING NEWS,

SID D. CHARLES.

AP 37
STOCKS
AJ 8 7/8
AC 6 5/8
ACN 95 7/8
APL 16 7/8
T 191 3/4
ANA 47 1/4
BO 29 1/8
CMS 4 1/4

CW 7 ¾
IH 94 ½
JL 45 ¾
K 56
NK 23
NYC 27 ⅞
NP 31 ¾
PKD 10⅜
UAL 44 ⅞
UC 5 ¾
USS 85
SALES 1,560,000
INDUSTRIALS 203.12
RAILS 65.15
UTILITIES 42.28
POUND 4.03 ½
CANADIAN EXCHANGE 90.85

W132PPS

April 11th, 1946.

Mr. Sid D. Charles,
The Daily Alaska Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

Thank you for your kind letter of April 8th.

In accordance with your letter, we are increasing your weekly billings as of April 3rd.

I am airmailing a copy of your letter to our Seattle office so that they can be guided accordingly

regarding your stock list and the major league bas
ball scores.

Again, thank you for your cooperation.

Sincerely,

P. A. MINER.

PAM:HS

(Airmail)

October 9, 1946.

Mr. Sid Charles,
The Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

My New York office advises they have received
request from you that we change your service
1,000 words of collect telegraph daily because of th
high cost of the leased wire plus operator.

We have had Malcolm Donnelley doing some i
tensive work in Alaska for the past several month
in a vigorous effort to line up some more clien
and thus reduce the cost of the operator throug
sharing this expense. However, to date we have n
succeeded.

We will, of course, go to the basis of 1,000 wor
by DPR if you prefer, but before doing so I wou
like to put the following up to you:

That United Press share the operator expense with you, on an open basis, for an indefinite period of time while we continue our efforts to line up added clients to share the expense. We simply would reduce your billing by $25.00 per week and absorb that cost ourselves. Then, if we succeeded in adding one more client, we would bill the $25.00 operating expense to him. If we added more than one, the total expense would be split three or more ways, bringing your figure down below $25.00.

By leaving this on an indefinite basis, I mean that you would retain your privilege of going on a 1,000-word overhead basis if you later decided to do so. Similarly, we would retain the privilege of giving you your choice of either going to the overhead basis or resuming the entire operator cost, should we find it advisable some time in the future to do so.

I would appreciate it if you'd airmail me whether you prefer to retain the present service at a reduction of $25.00 per week, or whether you wish to go on the overhead basis.

Sincerely yours,

DAN BOWERMAN.

January 7, 1950

Mr. Sid D. Charles,
The Ketchikan Daily News,
Ketchikan, Alaska.

Dear Sid:

Acknowledging your letter of Dec. 27th to C
Molander in New York, both Carl and Dan Bow
man in San Francisco put me to work pronto to
vestigate ways and means of meeting your situati

There are two possibilities I am now in proc
with. First we are making a complete checkup h
on Alaska schedules, operator costs, consolidati
of your schedule with Anchorage to determine j
what saving can be made.

Secondly, and this one will be a honey if we c
accomplish it, we are arranging to check whet
our San Francisco to Honolulu news files can
picked up in Ketchikan. Tests heve been complet
at KENI in Anchorage that show they can be pick
up there with excellent results. Even a limited t
on bringing them in on a teletype receiver was ma
successfully and we are shipping up a teletype
prolonged tests.

I talked with Bill Wagner of Alaska Broadcasti
Co. this morning, who as you know owns the stati
at Ketchikan. Bill assured me he would be glad
cooperate on tests. I do not know just what equi
ment he has there for doing so but we are checki
up.

Enclosed is a schedule of our MacKay transmission to Honolulu giving times and frequencies which you may care to discuss yourself with the engineer at KTKN.

KENI used a simple little frequency shift keyer to make their preliminary tests.

Here's what would be accomplished for you if this is worked out: You would get a large and complete file of national and world news daily that would give you a much more complete selection than it is possible to give you under the present arrangement where ACS transmission tolls must be paid and you would save the large toll cost which you now pay. We could supplement this file with a short one on news of specific interest to Alaska sent direct to you by ACS and direct protective coverage on the ones.

I'll report further to you very soon, Sid, and I assure you that we are making sincere efforts to get the problem worked out. Actually our additional Alaska business has materially increased the operating cost of this bureau instead of adding to the net but we are appreciative of your situation and are doing something about it.

Cordially,

FRED J. GREEN.

cc: Carl Molander
Dan Bowerman
J. L. Hoppes

United Press Associations
General Offices
News Building New York City

February 6, 195(

Seattle Bureau,
100 Fourth Ave. North.
Seattle 9, Wash.

Mr. Sid D. Charles,
The Ketchikan Daily News,
Ketchikan, Alaska.

Dear Sid:

We have gone over the situation thoroughly a find no way to make an immediate saving he However, we do appreciate your situation and v therefore offer you some immediate relief. We v reduce your rate $20 per week starting Febru 19th under the enclosed modification of agreement

This provides suspension of the rate clause our agreement for an indefinite period and the per week reduction in rate during such suspensi The term of the agreement to be extended by length of time of the suspension.

I have talked this over with Perry Hilleary v is now in the office and he has all the facts from standpoint. Perry says he will return to Ketchil on Wednesday or Thursday of this week.

If you will sign both copies of the enclosed mo fication and return both to me, I will then forwa

them to New York for execution by an officer of United Press and one executed copy will be returned to you.

Adding Alaska clients has not reduced our cost per point as we had hoped. Additional operators have been required and a news service tailored to Alaska needs and of the best quality have developed with the Alaska business. We have gone over the whole thing in detail, and have found no way to cut these expenses and maintain a quality service. We do want to meet your situation and are therefore willing to dig down for our share on the above rate reduction. We are continuing the tests on picking up the San Francisco to Honolulu news transmissions in Alaska. Good possibilities may develop from that and we shall keep you advised.

It has been very pleasant talking with your Perry Hilleary who appears to be a very able young man. Kindest personal regards.

Cordially,

FRED J. GREEN.

cc: CBM DB

MODIFICATION OF AGREEMENT

New York, February 21, 1950.

With reference to the agreement between United Press Associations and The Alaska Fishing News for United Press news service to The Alaska Fish-

ing News at Ketchikan, Alaska (now known as T
Ketchikan Daily News) it is mutually agreed that

1. The rate mentioned in Clause II thereof
suspended by mutual agreement starting Februa
19, 1950, and the rate during such suspension sh
be $52.52 per week.

2. This suspension may be terminated by eith
party at any time upon thirty days notice and t
weekly rate would then return to the present figu
of $72.52 per week.

3. The term of the agreement between the parti
shall be extended by the length of time during whi
the above suspension is in effect.

UNITED PRESS ASSOCIA-
TIONS,

By JACK BISCO,
Vice-President.

THE ALASKA FISHING
NEWS,

By SID D. CHARLES.

Blinds: FHB CBM

February 13, 1951.

Mr. Sid D. Charles,
Ketchikan Daily News,
Ketchikan, Alaska.

Dear Sid.

Your letter of January 23 asking that we cut down our one-hour pony to 30 minutes to help you reduce costs has been forwarded to me. Fred Green has been transferred to Los Angeles and my superiors asked me to make a study of the situation because I have had first-hand experience with the Alaska service for several years.

First of all, if you cut your news service in half, I feel it would be a risk to you. The world's news in just 3,000 words would be reflected in your editions and I'm very much afraid you soon would find it to be a dangerous economy. The savings in tolls would amount to only $13.50 per week.

Secondly, the reduction would not lessen our cost of operators and filing procedure at all, so there would be no savings we could pass on to you. Increased costs have far outrun the Alaska revenue we have added since we first started serving The Fishing News.

Fred and I hoped last year's modification reducing your rate $20 would help see you through a tough period. And now, as your battle goes on, I don't want to see the News weakened by a skeleton news report.

Since my bosses referred your letter to me, I ha
some authority to make a recommendation. And th
is my idea: how would you go for a new agre
ment altogether, with a flat rate of $50 a week f
a 10-year period? The lower rate would be a help
you and it would be offset by a longer period
service for United Press.

You helped establish United Press in Alaska a
we all have a real desire to see our pioneer clie
through to victory. You are putting up a swe
fight to give Ketchikan an independently edite
newspaper. I've been watching that battle dow
here ever since you and Bud told me about it.

That rate is a humdinger, but I think UP will
for it with the confidence I have that the Ketchika
Daily News is going to be around for a long time
we do our part. I hope the proposal looks good
you. It is fair to both you and United Press.

I wish we could talk about this across a desk
in your room at the Sorrento Hotel, but I hope yo
know I'm personally anxious to see you win th
battle up there.

Best regards,

Harry Carlson.

bcc: FHB FJG DDW LK CBM PAM

Seattle, Wash.

January 18, 1954.

Mrs. M. J. Flood,
Ketchikan Daily News,
P. O. Box 79,
Ketchikan, Alaska.

Dear Mrs. Flood:

Thank you for your letter of January 14 sent in reply to my telegram of January 13. In my telegram, I said I had just received word from our New York office regarding your recent letter directed there in which you referred to a previous letter of November 14, the original of which was never received in New York.

I also said I was perplexed by your reference to cancellation since the agreement between us had renewed a short time ago and a new term is now in effect. In addition there is an extension of the term by the conditions of a modification to the principal agreement made in February, 1950.

Clause Eighth of the agreement between us establishes machinery for the termination of that agreement. Neither of us has ever entered a cancellation against the agreement in conformity with the provisions established in Clause Eighth, and the agreement thus continues in full force and effect. We cannot, therefore, discontinue service to you.

I have taken the liberty of turning over to Martin Heerwald, our Washington-Alaska news manager,

your comments on Alaska news coverage. We ha
a continuing program to expand and improve o
service in every department, and your commer
will be helpful to him. Heerwald will be in Alas
himself later this week, and I have asked him to g
in touch with you for a more detailed discussion
these points.

With respect to our rates, my records here sh
that the increases you mentioned have been mo
than offset by reductions which have totaled near
$50 per week during the past seven years. The late
reduction, amounting to $20, was made in Februar
1950, and is still in effect. It seems to me on t
basis of the information I have here that we ha
been very fair in the matter of rate reductions
the past, making these in the face of constant
mounting costs to us to produce our news repo
I'm personally prepared to discuss the matter
rates with you further if you wish.

We have always been proud to be on your tea
at Ketchikan, and I regret very much that a m
understanding has arisen with respect to our agre
ment. It's my earnest hope that this letter will he
to clarify the matter and that everything w
shortly be straightened out to our mutual satisfa
tion.

With warmest regards and good wishes, I am

Cordially yours,

DAVID F. BELNAP.

WUS103 26 PD

Ketchikan, Alaska, Feb. 15, 1003P 1954.

David Belnap,

United Press Service Komo Bldg., Seattle, Wash.

Discontinue Press Service at Once am Shipping Teletype Via Freight Until UP Can Meet Terms and Service of Associated Press We Cannot Continue to Accept Service.

PAUL S. CHARLES,
Daily News.

240P

[Letters dated August 9, 1945; September 8, 1945, and October 12, 1946, a portion Plaintiff's Exhibit No. 1, are identical to letters attached to the Complaint. These letters are printed on pages 12 to 16 of this record.]

[Endorsed]: Filed August 21, 1954.

Received in evidence April 13, 1955.

PLAINTIFF'S EXHIBIT No. 2

Agreement

[This portion of Plaintiff's Exhibit No. 2 is identical to Exhibit A of the Complaint. This exhibit is printed on pages 6 to 11 of the record.]

Alaska Fishing News

August 28, 1945.

Edwin Moss Williams,
United Press Associations,
News Building,
New York City, N. Y.

Dear Sir:

In reply to yours of August 9. How much wou
an operator cost in case of a teletype being i
stalled? Since we were the first to petition your co
pany for a teletype for a combination rate wi
the local radio station, and you allowed Associat
Press to "jump the gun" on you, it seems we a
to be penalized for our enterprise. However, that
"water over the wheel." But we would be less tha
human if we did not remind you of our efforts
the past few years to get you to hold and expa
your service in Alaska.

Frankly, we question whether the extra expen
for even a six months' trial and the possible add
cost of an operator would be justified. After spen
ing a large sum for our own building and mode
machinery, the weakest link in our ambition to ha
the leading paper will be, it seems, competition
press service.

Anyway, let us know the expense of an operato
Also let us know what charge you will make f
giving us the present service daily, instead of thr

times a week, with a follow up by airmail as you are doing now, from Seattle.

Thank you for your prompt reply to this inquiry.

Yours very truly,

THE ALASKA FISHING NEWS,

/s/ SID D. CHARLES,
Editor.

Ketchikan, Alaska, Fishing News

Effective January 6th, 1946, total basic rate increased by $1.15 per week account operators' increase. This to be applied against One hour 6 Day Printer service.

Effective December 29th, 1946, total basic rate increased by $3.09 per week account operators' increase. This to be applied against One hour 6 Day Printer service.

Effective January 9th, 1949, total basic rate increased by $3.09 per week account operators' increase. This to be applied against One hour 6 Day Printer.

Effective January 9th, 1949, total basic rate increased by $2.06 per week account operators' increase. This to be applied against One hour 6 Day Printer.

Modification of Agreement

New York, February 21, 1950.

With reference to the agreement between Unite Press Associations and The Alaska Fishing New for United Press news service to The Alaska Fish ing News at Ketchikan, Alaska (now known a The Ketchikan Daily News) it is mutually agree that:

1. The rate mentioned in Clause II thereof suspended by mutual agreement starting Februar 19, 1950, and the rate during such suspension sha be $52.52 per week.

2. This suspension may be terminated by eith party at any time upon thirty days notice and th weekly rate would then return to the present figu of $72.52 per week.

3. The term of the agreement between the parti shall be extended by the length of time during whic the above suspension is in effect.

[Seal] UNITED PRESS ASSOCIATIONS,

By /s/ JACK BISCO,
Vice President.

THE ALASKA FISHING NEWS,

By /s/ SID D. CHARLES.

Received in evidence April 13, 1955.

Ketchikan, Alaska, Fishing News

Extraordinary Cost Assessment—Effective January 7, 1951, $4.75 per week.

Effective May 5, 1953, total basic increased by $4.18 per week account Labor Increase. This to be applied against One hour 6 Day Printer service.

[Letters dated August 9, 1945; September 8, 1945, and October 12, 1946, a portion of this Plaintiff's Exhibit No. 2, are identical to letters attached to the Complaint. These letters are printed on pages 12 to 15 of this record. Letters dated September 4, 1945, March 21, 1946, April 8, 1946, April 11, 1946, and October 9, 1946, a portion of this Plaintiff's Exhibit No. 2, are identical to letters appearing in Plaintiff's Exhibit No. 1. These letters are printed on pages 222 to 229 of this record.]

Received in evidence April 13, 1955.

PLAINTIFF'S EXHIBIT No. 3

The Ketchikan Daily News

February 10, 1950.

Mr. Fred J. Green,
United Press Associations,
Seattle Bureau,
100 Fourth Ave.,
Seattle 9, Wash.

Dear Mr. Green:

We are enclosing the two signed copies of the Modification Agreement as requested in your letter of February 6th.

Mr. Hilleary has not returned from Seattle ye hence we have not heard of his visit with you, bu we would like to take this opportunity to thank yo for your cooperation in the matter.

We keep hoping that "tomorrow the axe will fall on our opposition down the street but in the mean time such reinforcements as yours keeps the wo from our door.

Sincerely yours,

/s/ SID D. CHARLES.

Received in evidence April 13, 1955.

PLAINTIFF'S EXHIBIT No. 5

April 15, 1936.

Mr. Sid D. Charles,
(Airmail)
Ketchikan Fishing News,
Ketchikan, Alaska.

Dear Mr. Charles:

Pete Miner of our New York office sent me a cop of your April 8 letter, in which you remarked tha your competitor at Ketchikan divides his cost wit other stations, and in which you regretted that w had been unable to make a deal with Ed Kraft fo the Ketchikan station.

We certainly did our darndest to work out some thing with Kraft that would also benefit you, bu

the fact is that he is not sharing costs with your competitor, and the deal he wanted would not have shared UP costs either. In view of this, we thought it best to leave him alone.

What Kraft is using is not the full teletype that goes to the newspaper, or any part of it. Instead, he is taking 30 minutes of teletype a day at an hour that is not of use to a newspaper, and supplementing it by airmail drops from Seattle. He does not use any of the newspaper teletype copy and did not want to make any deal for using same, despite the fact it would be of value to him.

I had not heard that Cap Lathrop is contemplating a newspaper at Anchorage. For your confidential information, another Anchorage party wanted to start a paper there, but found himself absolutely stymied on getting newsprint, and was forced to check the idea until newsprint becomes available.

Best regards,

/s/ DAN,

DAN BOWERMAN.

cc: Harry Carlson,
United Press,
Seattle, Wash.

February 5, 1949.

Mr. Sid D. Charles,
Publisher,
The Ketchikan Daily News,
Ketchikan, Alaska.

Dear Sid:

Carl Molander has sent me your letter of Janua 29, with instructions to immediately rectify t editorial shortcomings you outlined.

Concerning the operators' assessment, I probab wish it was possible to get the transmissions c ordinated even more than you do. The more bus ness we add in Alaska, the more money we seem lose, because every client wants his copy at a diffe ent time of day, and instead of being able to send every one at once and reduce the teletype operato cost, we have to keep hiring more teletype operato And, while we probably could work out a mutuall agreeable filing time for the Ketchikan News a the Anchorage News, the ACS runs those as tv separate circuits so that the files cannot be combine

Editorially, my impression was that we were mil ahead of the AP as a general rule, and I'm gl to have it pointed out that there are defects in t coverage.

We are going to work to remedy these at onc and you'll be hearing direct from Harry Carlson Seattle thereon.

Best personal regards,

DAN BOWERMAN.

The Ketchikan Daily News

December 27, 1949.

United Press Association,
General Offices,
News Building, New York City.

Attention: Carl B. Molander.

Gentlemen:

Your teletype and press service is costing us just twice the amount the Chronicle, the opposition paper here, pays to Associated Press. They also get twice the wordage, one hour in the morning and one hour in the afternoon. We get one hour daily, from 11:00 a.m. to 12:00 noon.

In a letter dated September 4, 1945, your Mr. Dan Bowerman said: "As we added other clients in Alaska, of course, we would prorate the operator cost among them, so that the cost would decrease to you."

On the contrary, you have added other patrons and our costs have kept increasing.

On October 9, 1946, Mr. Bowerman said, on advice from New York:

"That the United Press share of the operator expense with you, on an open basis for an indefinite period of time, while we continue our efforts to line up added clients to share the expense. We simply would reduce your billing by $25 per week and absorb the costs ourselves. Then if we succeeded in

adding one more client we would bill the $25 ope
ating expense to him. If we added more than on
the total expense would be split three or more way
bringing your figure down below $25.

Since that letter was written you have added th
Anchorage News, besides, we understand, some rad
stations. We are told that the latest radio statio
KALA, at Sitka, channeled with the same news a
at the same hours as our news, has been given a r
duced conbination rate. If that is true, wh
shouldn't we receive the same benefit?

We are perfectly willing to change our hour
get on the same channel with Anchorage News
order to cut costs.

Frankly, we must cut costs. It just isn't in th
cards to pay twice as much for half the news whi
our opponent gets here through the Associate
Press. Unless our rates can be adjusted cooper
tively and in combination with other UP patrons
Alaska, we shall have to make some other arrang
ment.

Yours very truly,

SID D. CHARLES.

Harry—Original sent to New York office.

/s/ SID.

Received in evidence April 13, 1955.

PLAINTIFF'S EXHIBIT No. 9

The Ketchikan
Daily Alaska Fishing News

October 14, 1946.

United Press Associations,
Star Building,
Seattle, Washington.

Gentlemen:

Fellows, here's a bear story we printed which might be worth a re-hash. It's not many places where one bear furnishes a meal of apple pies, steak, and a fine robe for a cabin floor.

Some time ago I probably pulled a boner in asking you not to repeat any news from Juneau, as I understood your correspondent there would send me a carbon copy direct without need of clearing through the Seattle office. We haven't received a thing from Juneau for a long time, so perhaps we'd better depend upon your office for whatever comes in from any Alaskan town.

Another thing, can't you give me more shorts instead of too many long press dispatches? Of course, in case of really big news, I want full coverage.

On the whole, your service is excellent, and I am getting splendid co-operation from the Signal Corps, but every once in a while the opposition seems to get the edge on a story with an Alaskan slant.

We have left only one box of roll paper for th printer, so please send us a supply at your earl convenience.

Yours very truly,

THE DAILY ALASKA
FISHING NEWS,

/s/ SID D. CHARLES,
Editor.

The Ketchikan
Daily Alaska Fishing News

November 22, 1946.

Harry Carlson,
United Press Association,
Seattle Bureau,
Seattle, Washington.

Dear Harry:

I know how difficult it is to lay down any har and fast rules for service. Even though I get peeve at times and "blow my top," your staff is doing fine job, and are always co-operative. As you wil notice in the previous letter I sent you, copies whic I am enclosing, I stated there was very little interes here for hockey, although I know there is a larg national interest.

The main sports of interest here in season ar baseball, football, basketball and leading ring con

tests. Nearly all the school kids play basketball. There is interest in bowling and an occasional outstanding score might be all right.

On Mondays I have been picking up basketball scores from the Sunday P.I. when it arrives. Now, Harry, it is a hell of a job to try and give explicit instructions on any of these sports. I do not wish to sacrifice live news at any time, especially news with an Alaskan slant, for sports. At best we can hope only in having a skeleton report of sports and it takes some nice judgment to know which ones to feature. Other than for some outstanding game, about the best we can hope for, is to get score results for the major games.

Your new service with more shorts is fine.

Thanks again for your interest and pass along to members of your staff my appreciation. When I "blow my top," tell them the old geezer, with more than 40 years newspaper experience in Alaska, has "missed too many boats."

Give Bob Seal my regards if you see him.

Yours, as ever.

/s/ SID D. CHARLES.

Incl: cc ltr. May 7.
cc ltr. April 16.

SC/mid

The Ketchikan
Daily Alaska Fishing News

17 March, 1947.

United Press Association,
Seattle Bureau,
Seattle, Washington.

Attention: Harry Carlson.

Dear Harry:

We have only four rolls of teletype left. We u
the single rolls. Ordinarily a roll lasts about o
month. What we have on hand will carry us thr
or possibly four months, so thought we better g
in an order in time. The teletype is working fi
and the fellow from the Signal Corps takes ve
good care of it.

Want to congratulate you boys on the way t
stuff is coming in. Like very much your handling
congress, and am getting a better Alaskan coverag
Keep in mind sending as many short articles
possible, with, of course, always good coverage f
leading stories. Our circulation is continuing to pi
up without solicitation. Now that paper is promise
we intend to put on a drive.

Regards to all,

/s/ SID D. CHARLES,

DAILY ALASKA FISHING
NEWS.

The Ketchikan
Daily Alaska Fishing News

21 April, 1947.

United Press Association,
Seattle Bureau,
Seattle, Washington.

Dear Harry:

Today, Saturday, received from New York sample weekly mat service for $1.85 weekly plus 30 cents airmail. Frankly, Harry, it does not fill our particular needs, so you can order it cancelled. We will pay for what is sent meantime. Am giving you an extra copy for your New York office.

What we most need are pictures of Alaska, Northwest and Pacific Coast scenes. The reason I am writing you directly is because of your sympathetic understanding of our setup, and to know if you have any suggestion. Am wondering if there is a possibility of getting your organization there to send us mats of outstanding events from the Seattle Star or other Seattle sources and making the necessary charge. For instance, your UP dispatch told about pictures being taken of Ed Kerr, Grand President of the Alaska Pioneers, and those mats would have come in fine for our purposes.

This copy also will answer the letter sent us by Dan Bowerman from the San Francisco office, dated April 14. Your airmail service of UP dispatches from Seattle and the Red Letter service are greatly

appreciated. Again I want to thank your office pa
ticularly for such fine co-operation.

Yours truly,

/s/ SID D. CHARLES,

DAILY ALASKA FISHING
NEWS.

The Ketchikan
Daily Alaska Fishing News

September 27, 1947

Harry Carlson,
United Press,
Seattle, Wash.

Dear Harry:

That Jack Ryan's column, "Seattle Calling,"
making a hit with Bud, Bob, myself and the sta
Also have received outside favorable comments. Y
know, while we won't admit it, Southeast Alas
especially, is a sort of suburb of Seattle, and, the
fore, Seattle gossip interests a large number.

Suppose you've read about the $30,000 libel s
filed against the Opposition. The joke of it is th
the editor will hardly dare to divulge the high sou
of where he secured his information.

Let me assure you that we appreciate the effo
you and the local UP staff in Seattle are doing f

coverage. Bob Coleman, one of our linotype operators, is planning on buying from us enough of our spare machinery to start a paper in the co-op colony at Haines. If deal goes through will let you know and you might arrange with him for service. You can write him, anyway, if you care to. De Armond said Clark of Juneau was in and is preparing to leave Juneau, but already has informed you so you can arrange for Juneau coverage.

Yours in haste as usual,

SID D. CHARLES.

UP V Uwk 3 30 Paid Dl
Ketchikan, Alaska, Dec. 24, 1947, 9 a.m.

Harry S. Carlson,
United Press, Seattle.

No Paper Christmas Day. Merry Christmas and Happy New Years to Yourself and Charming Wife and Convey Same to Your Efficient Staff. Remember Latchstring Is on Outside for You All.

SID AND BUD CHARLES.

24/1702Z

Pls Ack
OK UP

October 8, 1947

Mr. Sid D. Charles,
Daily Alaska Fishing News,
Ketchikan, Alaska.

Dear Sid:

Our New York office has asked me to find out t
actual street address of the Fishing News in Ketc
kan. We need it for insurance purposes on the te
type machine and a post office box number will n
suffice.

Can you supply me your street address, sir?

We have just moved our bureau headquarters a
I'm snowed under with readjustments and reorga
zation, which includes the addition of several m
to the staff and general expansion of our Seat
bureau. Will tell you about it sometime when
have more time. I hope, however, that in the ge
eral confusion of moving you have not suffered
our file to you.

Best regards,

HARRY CARLSON.

The Ketchikan
Daily Alaska Fishing News

Oct. 15, 1947.

Dear Harry:

Street number of the Daily News is 501 Dock Street.

Note what you say about moving and would be glad to know details later. The only thing I notice about the file is lack of receiving briefed stock news. That is a feature I would like to keep up. Quite a few are now depending on the stock news we receive.

Bob and Bud both send their best regards.

Yours truly.

/s/ SID D. CHARLES.

Tell Jack Ryan we think he is doing a swell job on "Seattle Calling." The Colman Building where most of the Alaska Salmon cannery people have their offices, and a lot of other firms connected with Alaska, might be a good news source for him.

BOB DeARMOND.

The Ketchikan Daily News

January 26, 1948.

Harry Carlson,
United Press,
Seattle, Washington.

Dear Harry:

I want you to pass along the enclosed to M
Baillie and tell him from me in all my fifty yea
of active newspaper work I have never seen su
an effort to threw up a smoke-screen or make
mountain out of a mole-hill as the Governor Grue
ing-Sondberg crowd to try and discredit a report
—in other words, John Ryan.

We thought in answering the Governor's co
plaint about the way this paper, The Daily New
handled the Legislature, we had given Mr. Bail
a hint of the one-sided and prejudiced manner
which the Governor's crowd operates. The prese
incident transcends all former efforts.

The "crime" of the News is that it insists
being an independent paper, and not a mere to
or stoogie the same as our Opposition in this cit
I won't even admit that Mr. Ryan pulled a bone
He had good reason for believing his statement w
based on facts. The only loophole they could fi
is that he, himself, did not attend the meeting. M
Baillie must have been a reporter at one time li
myself and I would like to ask if he, myself or a
other good reporter always have met every occasi

without any slipup. My training was that only in case of personal prejudice or malicious intent, or refusal to correct any proven errors, was there ground for criticism.

Ryan has been a thorne in the side of the Opposition ever since he started his newsy column because of its readers' appeal in this section. The present correspondence shows to what extent the Governor's crowd will go to try and discredit any one who "won't play ball" with it. If I were Ryan's chief I would stand behind him until hell freezes over. Now, Harry, I want Mr. Baillie to know the splendid co-operation we are getting from your staff. We are doing all we can to reciprocate. We talked today to Bill Wagner of the Alaska Broadcasting Company and he was sympathetic to getting a hookup with the UP if the UP can get a better coverage in Alaska in the future. We are not trying to tell Mr. Baillie how to run his business but we don't like to see anyone discredited by a "smear campaign" under the clever guise of "keeping the press clean."

Yours as ever,

/s/ SID D. CHARLES.

The Ketchikan Daily News

Feb. 23, 1948.

Dear Harry:

We have on hand now just two rolls of teletyp paper. One roll lasts about a month. It is singl rolls. Am enclosing example.

Harry, your staff is doing an excellent job, bu would appreciate more "shorts" whenever possible The Congress review each time is excellent an handled with skill. The Seattle column also is spe cially good. In any leading story, of course, we wan details but in the "mill of run stuff" would ap preciate more shorts as we are trying to make "newsy looking" front page and don't like to breal over too many stories.

We are arranging to go to eight pages in March Bob and Bud send their best regards.

Yours truly,

/s/ SID D. CHARLES.

The Ketchikan Daily News

March 14, 1948.

Dear Harry:

Meant to answer yours of March 2 sooner, bu you know how it is with us newspaper guys i writing letters. Your letters to Jesse Hogue go results from Roger Johnson and Rosemarie. I

fact, I had about decided that the United Press was indifferent to our demands, figuring we were too "small fry" to bother about. So it was indeed refreshing to learn that this was not so.

For your own information we were all ready to sign papers for taking over opposition with promise of Baker to sign but the entire political gang he is tied up with came here for the Democratic convention and he changed his mind, and secured enough money to make good an IOU sum he had borrowed from his firm. We had talked over press service and figured on keeping for a time both UP and AS and if later one was dropped it would be the AS. As it is now we shall have to slug it out. When our present 6-page rolls are used up we will begin an 8-page in April and have ordered some additional feature. Bud and Bob both send their regards, especially to Mrs. Carlson.

Yours,

/s/ SID D. CHARLES.

The Ketchikan Daily News
April 16, 1949.

Harry Carlson,
Seattle, Washington.

Dear Harry:

Meant to answer yours of April 7 sooner. I admit the Washington, D. C., service has improved.

But the breaks seem to be against us in an occa sional big story. Take the earthquake, for instanc The coverage was fine but for the important pa that no deaths were listed in the first coverag People kept calling us on the phone and I a swered, fortunately from our account there we no deaths, when, lo, the opposition came out tha seven deaths were reported.

Now, here's the score: The Chronicle receives it AP news from 7:00 to 7:30 and 8:00 to 9:00 a.m and 1:00 to 1:30 p.m. The KTKN radio takes separate AP report also listed the possible death As you know our time is from 11:00 to 12:0 a.m. I noticed the UP report to the Anchorag Times on the same day gave two deaths. A brie added bulletin after 1:30 p.m., Chronicle Tim would have saved the day for us.

I don't know the full modus operandi of th Signal Corps. I am told that we cannot receive any thing during the hours they are sending to the A or KTKN. But would it not be possible to shoot special wire in case of an emergency? Anyway, eve after 1:30 p.m., latest Chronicle time, a bulleti still would have saved us.

Now, regarding our deadline:

As a usual thing, we try and get the last form locked up at 3:00 p.m. Sometimes, under favorabl conditions, we get going at 2:30 and sometimes because of delays, it is 3:30.

In case of a tip that an Important late file was coming, we could hold our forms. However, unless it was very important, or supplementary to a story we already had received, it would be best to hold it for next day's filing.

As you know, Harry, it is damned hard to lay down any hard and fast rules. We are cutting into the circulation of the Opposition. Its biggest assets seem to be the AP and Drew Pearson's column.

Bud and DeArmond and myself are fully appreciative of your fine co-operation. We fully realize the difficulties you are up against. I recall that in early days the UP made a special effort to give increased or rather special coverage of surrounding districts of its clients. But since it has become an international organization, it goes on the same theory as the AP, that is, special correspondents should be hired to get other than mill of the run news. I am surprised that you have been able to get as much as you have for us. Naturally we seem a "small potato" in the over-all coverage of the UP. But the fact remains we initiated the UP entrance into Alaska, and it is a field well worth getting special attention from your national headquarters.

Whenever possible, without too much sacrifice of vital parts of lead stories, we would appreciate more "shorts."

By the way, your follow up on the Quake story has been excellent; also like your "human interest" stories such as the "Weeping Statue," etc.

Important—Be sure and order teletype roll
Have one left good for about a month. This is th
third notice. It is single roll; am enclosing a sampl

Bud says to remind you that the Big Fish Derb
has opened and you might come north and snag
prize salmon. Anyway, he says send the Mrs. nor
for a vacation and "he'll take care of her." We
see that he will have plenty of competition. Anywa
give Mrs. Carlson our regards.

Yours,

/s/ SID D. CHARLES.

P.S. (Confidential): We are looking around fo
a good reporter. Bob DeArmond is leaving us
about a month for an operation, and he expects
be gone at least nine months. Should we be able
get a good all-around newspaper man who will a
tend to business, we can reasonably assure him
permanent job.

/s/ S.D.C.

[A letter, dated April 8, 1946, is identical to th
letter set out in full in Plaintiff's Ex. No. 1. Se
page 225 of this record.]

Received in evidence April 14, 1955.

DEFENDANTS' EXHIBIT G

The Ketchikan Daily News
Post Office Box 79
Ketchikan, Alaska

November 14, 1953.

United Press Association,
News Building,
New York City, N. Y.

Gentlemen:

This letter will authorize you to cancel our news service with the United Press Association as of January 15, 1954.

We have long contemplated a change, feeling that we could not continue to pay higher and higher rates for the same amount of news. When we began service with you in 1945 the rate per week was $38.17—it is now $61.45. I am well aware of the rising costs, but the point is, we are not in the position to afford it. Over the years we have had a good deal of correspondence with you on the different rate changes. During a visit to Seattle, I stopped at your Seattle Bureau with the thought in mind to make arrangements for cancellation and was informed by your Mr. Beauchamp that perhaps something could be arranged and not to be hasty in making other arrangements. That was in July of this year. I have not heard from either your Seattle office or your own office since then.

Mr. Charles has been somewhat unhappy with th news coverage we get on Alaska in the past and w have been scooped a good many times by our op position.

We thank you for your past courtesies and hop that this cancellation will not prove troublesome fo either of us.

Sincerely yours,

M. J. FLOOD.

Received in evidence April 13, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the United States Dis trict Court for the District of Alaska, First Divisio thereof, do hereby certify that the hereto-attache pleadings are the original pleadings and Orders o the Court filed in the above-entitled cause and ar the ones designated by the Appellant hereto to con stitute the record on appeal herein.

In Witness Whereof, I have hereunto set my han and caused the seal of the above-entitled court to b affixed at Juneau, Alaska, this 23rd day of August 1955.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 14863. United States Court of Appeals for the Ninth Circuit. United Press Associations, a Corporation, Appellant, vs. Sidney Dean Charles, Paul S. Charles and Patricia Charles and the Pioneer Printing Company, a Corporation, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed August 25, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14863

UNITED PRESS ASSOCIATIONS, a Corpora
tion,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S
CHARLES, PATRICIA CHARLES, and th
PIONEER PRINTING COMPANY, a Co
poration,

Appellees.

APPELLANT'S STATEMENT OF POINTS

In the United States Court of Appeals for th
Ninth Circuit, appellant proposes to rely upon th
following points as error:

1. The court erred in making its order of Apr
12, 1955, in which it was ordered that this case b
tried by a jury, and it erred in permitting this cas
to be tried by a jury and not by the court.

2. With reference to Instruction No. 4 of th
court's instructions to the jury——

a. The court erred in instructing the jury tha
the term of the contract, the subject of this actio
would expire on September 27, 1957, rather tha
as appellant maintained, on September 27, 1962.

b. The court erred in giving to the jury tha
portion of Instruction No. 4 which reads as fo
lows:

"In determining the amount of damages, if you find that plaintiff is entitled thereto, you may consider * * * the probability of change during the period referred to in the rates, the cost of doing business, and the margin of profit as well as the probability or improbability that the defendants would remain in business."

3. The court erred——

a. In entering its judgment of April 22, 1955, ordering that appellant take nothing by its complaint;

b. In failing and refusing to ignore the jury's verdict herein and to make its own independent findings of fact and conclusions of law; and

c. In failing and refusing to enter judgment for appellant for adequate and substantial damages, as established by the evidence, and for appellant's costs and attorneys' fees.

4. The court erred in entering its minute order of May 20, 1955, denying appellant's motion under Rule 59, Federal Rules of Civil Procedure, to vacate judgment or for a new trial.

Dated: August 22, 1955.

/s/ JOHN H. DIMOND,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1955.

No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS,
a corporation,
Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANT.

JOHN H. DIMOND,
Juneau, Alaska,
BAKER, HOSTETLER & PATTERSON,
DONALD D. WICK,
Union Commerce Building, Cleveland, Ohio,
Attorneys for Appellant.

FILED
JUN 26 1953
PAUL P. O'BRIEN, CLERK

BERNAN-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS,
a corporation,
Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an action, tried before a jury, in which appellant sued appellees for damages for breach of contract in the amount of $21,489.57. (R. 3.) On April 15, 1955, the jury rendered its verdict in favor of appellant, awarding damages in the amount of $368.70. (R. 35.) Judgment was entered on April 22, 1955 (R. 37-38), and on April 25, 1955, appellant filed its motion under Rule 59, Federal Rules of

Civil Procedure, to open and set aside the judgment or, in the alternative, for a new trial. (R. 39-40.) This motion was denied by the District Court by minute order entered on May 20, 1955. (R. 41.)

An appeal was taken on June 10, 1955, by filing with the District Court a notice of appeal. (R. 41.) The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA Sec. 101; the jurisdiction of this Court, on Sec. 1291 of the new Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether the trial Court committed reversible error in ordering that this action be tried by a jury—in the presence of a waiver of jury trial by appellees and the absence of a demand therefor by either party.

2. Whether the damages awarded appellant by the jury were so wholly inadequate as to lead to one or more of these conclusions:

(a) That the jury simply ignored the uncontroverted evidence before it and arbitrarily assessed damages in such a manner that appellant would take nothing from the litigation—thus giving rise to an inference of prejudice on the part of the jury.

(b) That such inadequacy of damages stems from errors in certain of the court's instructions to the jury.

(c) That the jury failed to follow other of the Court's instructions.

3. Whether the damages awarded appellant were so totally inadequate that the trial Court's refusal to either enter judgment for appellant for the correct amount of damages or to grant a new trial was such an abuse of discretion as to be reviewable by this Court.

4. Whether this Court should modify and increase the judgment below so as to allow appellant damages in the amount established by the uncontradicted evidence, or whether this Court should grant a new trial to be restricted solely to the issue of damages.

STATEMENT.

On or about June 30, 1945, appellees, Sidney Dean Charles, Paul S. Charles and Patricia Charles, a partnership doing business under the name of "Alaska Fishing News", entered into a written contract with appellant, United Press Associations, a New York corporation engaged in the business of accumulating and disseminating news reports to newspapers and radio stations. Under the terms of this contract, appellant agreed to furnish its regular news report to appellees for use in their newspaper published at Ketchikan, Alaska, and appellees agreed to pay for such news report a specified sum of money each week. (R. 3-18.) Appellee, Pioneer Printing Co., an Alaska corporation, is the successor to the Charles' partnership, and on or about April, 1948, this corporation took over the ownership and publication of the

Charles' paper—it being then and subsequently called the "Ketchikan Daily News." (R. 106.)

This contract, although originally for only a three-year term, was automatically renewed from time to time, and each of the parties performed its part of the bargain under the contract until about February 14, 1954, when appellees wrongfully and wilfully breached the contract by refusing to accept and pay for any further service. (R. 5, 58-59, 88.) At this time the term of the contract had been extended and would not have expired until September 27, 1962. (R. 4, 84-86.)

On April 23, 1954, appellant commenced this action, demanding judgment for breach of contract in the amount of $21,489.57—this representing appellant's loss of profits, or the difference between the aggregate amount that appellant would have been entitled to receive under the contract and the costs to appellant of furnishing its news service to appellees during the unexpired term of the contract, i.e., from February 14, 1954, to September 27, 1962. (R. 7, 88-98.)

On May 15, 1954, appellees filed their answer to appellant's complaint (which included a counterclaim for certain drafts, totaling $368.70, inadvertently cashed by appellant) (R. 18-23), and on June 4, 1954, appellant served and filed its reply to the counterclaim—admitting the material allegations thereof, including the counterclaim. (R. 23-24.) Nearly two months later, on August 5, 1954, appellees moved for a jury trial—basing such motion upon Rules 38 (a) and 39 (b) of the Federal Rules of Civil Procedure.

(R. 24.) This motion was argued by the parties, and then denied by the District Court. (R. 25, 46-47.)

For the next five and one-half months nothing further was done in respect to this matter, and the case was eventually set down for trial, before the Court and not a jury, at Ketchikan, Alaska, on April 13, 1955. Two days prior to the trial date, i.e., on April 11, 1955, the Court suddenly and without prior notice to appellant decided on its own initiative that a jury would be summoned to try the case. The following day appellant's counsel, in open Court, voiced his objections to such action of the Court (R. 47-50), but the objections were not sustained and the Court on April 12, 1955, entered an Order as follows:

> "Since the denial on September 24, 1954, of the defendants' motion for a jury trial, editorials have appeared in the defendants' newspaper in defense of the judge of this court from attacks by Warren Taylor. I feel that in these circumstances I should not be the trier of the issues of fact in the foregoing case, and hence it is
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> "Ordered, sua sponte, under Rule 39, F.R.C.P., that the case be tried by a jury." (R. 25.)

The case then proceeded to trial before a jury on April 13, 1955, and there two principal issues were to be determined:

(1) Whether appellees' breach of the contract was without justifiable cause—appellees' defense in this respect being that appellant had failed to furnish appellees with the type of news service agreed upon, and

(2) If appellees' breach were inexcusable, then what was the monetary amount of appellant's damages, or loss of profits.

With respect to the first issue, even though there was conflicting testimony, appellant introduced substantial evidence which proved that it had complied with the contract and had furnished an adequate news service, (R. 55-58, 62-63, 81-82, 190-200, 249-264); and on the second issue, appellant's loss of profits were shown by uncontroverted evidence to be $21,489.57. (R. 88-98.)

On April 15, 1955, the jury returned its verdict in favor of appellant, but for damages only in the amount of $368.70 (R. 35)—this being the precise amount mentioned in appellees' counterclaim, the allegations of which appellant had admitted. (R. 22-24.) Arguments were heard by the Court in Juneau on April 21, 1955, on the form of judgment to be entered (R. 205-215), and on April 22, 1955, judgment was entered by the Court. (R. 37-38.)

Thereafter, on April 25, 1955, appellant filed its motion under Rule 59, Federal Rules of Civil Procedure, requesting the Court to set aside the judgment of April 22 and to make its own independent Findings of Fact and direct entry of judgment for appellant in the amount alleged in the complaint and as established by the evidence at the trial, or, in the alternative, to order a new trial. (R. 39-40.) Without opinion, the Court denied this motion by a minute order entered on May 20, 1955. (R. 41.) This appeal followed. (R. 41.)

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In making its order of April 12, 1955, in which it was ordered that this case be tried by a jury, and in permitting this case to be tried by a jury and not by the Court. (R. 25.)

2. With reference to Instruction No. 4 of the Court's Instructions to the Jury—

(a) In instructing the jury that the term of the contract, the subject of this action, would expire on September 27, 1957, rather than, as appellant maintains, on September 27, 1962. (R. 30.)

(b) In giving to the jury that portion of Instruction No. 4 which reads as follows:

> "In determining the amount of damages, if you find that plaintiff is entitled thereto, you may consider . . . the probability of change during the period referred to in the rates, the cost of doing business, and the margin of profit as well as the probability or improbability that the defendants would remain in business." (R. 30-31.)

3. (a) In entering its judgment of April 22, 1955, ordering that appellant take nothing by its complaint. (R. 37-38.)

(b) In failing and refusing to ignore the jury's verdict herein and to make its own independent Findings of Fact and Conclusions of Law. (R. 39, 41.)

(c) In failing and refusing to enter judgment for appellant for adequate and substantial damages,

as established by the evidence, and for appellant's costs and attorneys' fees. (R. 40, 41.)

4. In entering its minute order of May 20, 1955, denying appellant's motion under Rule 59, Federal Rules of Civil Procedure, to vacate the judgment or to grant a new trial. (R. 41.)

SUMMARY OF ARGUMENT.

I.

Appellees failed to demand a jury trial within the time allowed by Rule 38(d), Federal Rules of Civil Procedure, and then attempted to seek relief from their waiver by motion under Rule 39(b). (R. 24.) This motion was expressly denied by the Court below. (R. 25, 46-47.) In spite of this, however, the District Court, less than two days before the trial in this action and without prior notice to appellant, ordered a jury trial solely on its own motion. (R. 25.) The Court had no right to thus act *sua sponte,* and therefore this was error. *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229. And this error was prejudicial because of the difference in the scope of appellate review between a jury and a non-jury case, *United States v. U. S. Gypsum Company,* 333 US 364, 394-395. Appellant on this appeal is asserting that the damages awarded by the jury were inadequate, and since a jury's verdict is involved it is not sufficient merely to show that a mistake has been made but it is necessary to establish

that the inadequacy was "gross". *Southern Pacific Company v. Guthrie,* 186 F2d 926, 932-933. (CA-9, 1951.)

II.

It was conclusively established by the evidence that when appellees repudiated the contract for appellant's news service on February 14, 1954 the value of the contract, that is, what appellant was entitled to receive under the contract, was $56.45 a week; the cost to appellant of furnishing this news service to appellees was $8.66 per week, which meant that appellant's net profits—lost by reason of the appellee's breach—was the sum of $47.79 a week; and the term of the contract would not have expired for a period of 449 and 4/6th weeks. Hence, appellant's damages, or lost profits, were the product of $47.79 and 449 and 4/6 or $21,489.57. *Star-Chronicle Publishing Company v. United Press Association,* 204 F. 217 (CA-8 1913); *United Press Association v. McComb Broadcasting Company,* 28 So. 2d 575 (Miss. 1947). But the jury awarded appellant only the sum of $368.70, the exact amount of appellees' counter-claim which had been admitted by appellant. Hence, it is readily apparent that the damages awarded were grossly inadequate.

III.

The District Court's instructions to the jury (R. 30-31) made this clear: that the jury had to find either that appellees had wrongfully breached the contract or that they were justified in rescinding it,

and if the former, that appellant would then have to be awarded substantial damages. The jury found by its verdict that appellees had wrongfully breached the contract, the correctness of which finding appellant does not challenge, but it failed to assess damages in the manner directed by the Court's instructions. This action by the jury was so obviously capricious and arbitrary that it was an abuse of discretion on the part of the trial Court to refuse to grant a new trial on the issue of damages. *United Press Associations v. National Newspaper Association,* 254 F. 284, 286 (CA-8, 1918); *Barnsdall Refining Corporation v. Cushman-Wilson Oil Company,* 97 F. 2d 481, 485 (CA-9, 1938).

IV.

The District Court gave the jury erroneous instructions—first, in shortening the unexpired term of the contract by a period of approximately five years (R. 30), and secondly, in failing to make clear to the jury that appellant's damages, or lost profits, were to be measured by the contract price less the expense of furnishing appellant's news report to appellees for the balance of the unexpired term of the contract (R. 30-31). See *United Press Associations v. McComb Broadcasting Corporation,* 28 So. 2d 575 (Miss. 1947). These were errors of law which could well have led to the absurd result here, that is, the award to appellant of only the sum of $368.70, the precise amount of appellees' admitted counter-claim. This alone would be sufficient reason for a reversal by this Court, *Chesapeake & Ohio Ry. Co. v. Gainey,* 241

U.S. 494, 496 (1915); *Legler v. Kennington-Saenger Theatres, Inc.,* 172 F. 2d 982, 984 (CA-5, 1949).

V.

When the jury returned its verdict in favor of appellant, it correctly decided that appellees had wrongfully repudiated the contract; and the evidence which justified this finding on the part of the jury had no connection with other evidence in the case which related to the profits which appellant lost by reason of such breach. Consequently, the issue of damages can be re-tried alone without any injustice, and in fact it would be an injustice and unduly burdensome to compel appellant to re-try the issue of liability, in view of the jury's verdict in its favor on that issue—the correctness of which appellant does not challenge. Therefore, a new trial should be limited solely to the issue of damages. *Yates v. Dann,* 11 FRD. 386 (D.C. Del. 1951); *Greater American Indemnity Company v. Ortiz,* 193, F. 2d 43, 47 (CA-5, 1951).

VI.

Appellant received a verdict in its favor, i.e., the jury decided that appellees were not justified in rescinding the contract; and since the evidence undisputably established the elements comprising appellant's damages, or what appellant lost by reason of appellees' breach, the amount that appellant ought to have been awarded was a mere matter of mathematical computation. Thus, since the amount of damages properly to be awarded was not factually in dispute, there is nothing to prevent this Court from entering judgment

for appellant for the disputed amount. This Court would not be substituting its own judgment for that of the jury, but would be merely adding to the verdict that amount of lost profits which appellant is entitled to as a matter of law. *Stanton Electric Manufacturing Company v. Klaxon Company,* 125 F. 2d 820, 825, 826 (CA-3, 1942); *Marshall v. Equitable Life Assurance Society,* 116 F. 2d 901, 903 (CA-6, 1941); *Moore's Federal Practice,* Vol. 6, pp. 3748-3749, Section 59.05 (3); id. p. 3755, Section 59.05 (4); id. p. 3804, Section 59.08 (4).

ARGUMENT.

I. THE ACTION OF THE TRIAL COURT IN HAVING THE CASE TRIED BY A JURY WAS ERROR.

At least two months after the service of the last pleading directed to any issue in this case triable of right by a jury, appellees—apparently realizing that they had waived their right to a jury trial by not making a demand therefor within the prescribed ten-day period (Rule 38 (d) F.R.C.P.)—sought relief from such waiver by filing a motion under the provisions of Rule 39 (b), F.R.C.P. (R. 24) This motion was argued by counsel for both parties, was considered by the Court, and was expressly denied. (R. 46-47, 25.) Hence, from that date on no other assumption could have been made by appellant than that the action would be tried by the Court alone.

From the date of the Court's denial of appellees' motion on September 24, 1954, and until April 11,

1955 (which was two days before the trial of the action), no indication was given that the action was to be tried other than before the Court. Suddenly, however, and without prior notice to appellant's counsel, the Court solely on its own initiative decided that a jury would be impanelled to try this case. (R. 25) Appellant's objections to this summary action (R. 47-50) were unavailing—the Court ordering that the action be tried by a jury and giving its reasons as follows:

> "Since the denial on September 24, 1954, of the defendants' motion for a jury trial, editorials have appeared in the defendants' newspaper in defense of the judge of this Court from attacks by Warren Taylor. I feel that in these circumstances I should not be the trier of the issues of fact in the foregoing case, and hence it is
>
> "Ordered, sua sponte, under Rule 39, F.R.C.P., that the case be tried by a jury." (R. 25.)

Appellant submits that this action by the District Court was capricious and arbitrary, and was prejudicial error sufficient to justify this Court in granting a reversal.

1. The District Court's Error in Ordering a Jury Trial.

Rule 38, F.R.C.P., preserves the right of trial by jury, but conditions the exercise of such right upon a party making a demand therefor. If such demand is not made within a prescribed time, then the right has been waived, and thereafter the issues in a case, even though they be such as to be triable of right by a jury, are to be tried by the Court. This requirement,

however, is subject to the provisions of Rule 39 (b) which read in part as follows:

> " . . . but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court *in its discretion upon motion* may order trial by jury of any or all issues." (emphasis added.)

Thus, in order for a party to be relieved from his waiver of a jury trial he must make a motion under Rule 39 (b), and the Court thereafter may grant such motion "in its discretion".

In this case it is submitted that there was neither (1) a "motion" which would justify the entry of the Court's order of April 12, 1955, to the effect that this action would be tried by a jury, nor (2) the exercise of a "discretion" in the making of such an order.

(a) Appellees had waived the right to have the issues in this case tried by a jury, and the Court on September 24, 1954, refused to relieve them from the effects of their waiver under the discretion vested in it by Rule 39 (b)—apparently, choosing to adhere to the practice of this Court sitting in Anchorage, as established in the case of *Beckstrom v. Coastwise Line,* 13 FRD 480, 483, 14 Alaska 140, 197-198. (R. 47) It was, then, not until practically the eve of the trial of this case that the Court, without any prior notice to the parties, ordered a jury trial. No motion for the same was made by appellees, nor can it be held logically that the Court was, in effect, merely changing its decision on the motion denied in September, 1954. The

record shows that appellees' counsel specifically stated that he made no motion for a jury trial "at this time", which obviously negatives any inference that he was, on April 12, 1955, renewing his motion made the previous Fall. (R. 49-50) Moreover, the Court stated expressly that the order was made "sua sponte", that is, on the Court's own initiative. (R. 25) Consequently, the Court's order was made not in accordance with the authority granted by Rule 39(b), for there it is clearly set out that in order to obtain relief from a waiver of a jury trial, there must be a motion, and this logically must refer only to a motion made by a party to an action and not to a motion of the Court itself. Rule 39(b) may be compared with Rule 39(c) where in certain cases the Court is authorized to impanel an advisory jury "upon motion *or its own initiative.*" The italicized words did not appear in Rule 39(b) and their omission compels the conclusion that the Court cannot act *sua sponte* under Rule 39(b).

That this is the proper meaning of Rule 39(b) is clear from an opinion of the Court of Appeals for the Tenth Circuit, decided in 1942, in the case of *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229. In that case, a suit on insurance policies, neither party had at any time demanded a jury trial, but at the commencement of the trial the trial Court advised the parties that a jury would be impanelled in an advisory capacity. This was done and interrogatories were submitted to the jury, but at the conclusion of the case, after the jury's verdict

had been returned, the Court disregarded the verdict and made its own independent findings of fact, conclusions of law and decree. On appeal it was asserted that the trial Court had erred in calling a jury. The Court of Appeals, in speaking on this question, made it quite clear what Rule 39(b) meant. It said:

> (a) That the issues in the case, being basically legal in their nature, were triable of right by a jury.
>
> (b) That the parties were thus entitled to a jury as of right under Rule 38, but that if no demand is made in accordance with that rule, the right is waived.
>
> (c) That in spite of the waiver, the Court, in its discretion, upon motion of either party, could order a jury trial; but that it could not do so on its own initiative—even by calling a jury in a merely advisory capacity, since an advisory jury can only be called in actions "not triable of right by a jury."

From this it is clear that the Court did not have the authority on its own initiative to call a jury in any capacity when a jury has been waived, and in the absence of a motion from a party to the action. Under the circumstances of this case—the waiver of a jury trial by appellees, the absence of any motion for a jury, other than that denied in September, 1954, and the action by the Court in calling a jury, sua sponte —appellant was deprived of its right to have the cause submitted and tried by the Court alone.

(b) Neither, it is submitted, was the Court's action in ordering a jury done in the exercise of a "discretion" vested in it by Rule 39(b). When the motion of appellees' under this Rule was argued in September 1954, appellant cited to the District Court authority for the proposition that the exercise of the discretion of the Court must be based upon some circumstance warranting its exercise—otherwise it would constitute nothing more than an arbitrary act; and that such discretion should never be exercised unless there was in the record a showing of the existence of some plausible circumstance that would cause or justify the mind to act. See *Krussman v. Omaha Woodman Life Insurance Society,* 2 FRD 3; *Steiger v. Mullaney,* 8 FRD 486; *Arnold v. Chicago B & Q R. Co.,* 7 FRD 678, 680.

There simply was no "plausible circumstance" here that justified the action of the trial Court—even if there had been a motion by appellees for a jury trial. Appellant had nothing to do with the attacks on the Judge of this Court by Warren Taylor, nor with the editorial comment thereon which appeared in appellees' newspaper; and yet, merely because of these fortuitous circumstances, appellant has been deprived of its *right* to have the case tried by the Court—a right that appellant had relied upon from September 24, 1954, until the eve of the trial on April 12, 1955. The fact that the appellees chose to write editorials about the Judge of the District Court certainly did not constitute a reasonable or valid basis for that Court suddenly taking an action that could not help

but result in prejudice to appellant and in an advantage to appellees. The calling of a jury, then, at the last moment was not the exercise of a discretion but a mere arbitrary act. No authority for this is vested in the Court by Rule 39.

Moreover, because of the almost complete absence of prior notice, the calling of a jury was a matter of surprise to appellant that could not be adequately prepared for, and thus was prejudicial to appellant. If appellant had had any reasonable notice, the preparation of its case would certainly have been different. For example, rather than relying almost entirely upon depositions, which are generally ineffective as far as juries are concerned, at least one, if not two, of the witnesses who gave their testimony by deposition would have been present in person to testify. And since appellant's counsel was not well acquainted in Ketchikan, appellant was prejudiced by a lack of opportunity to secure any reasonably adequate knowledge of the jurors that were to serve in the case.

For the five and one-half months prior to the date of trial, appellant relied on the belief that there was to be no jury. If such reliance is an important factor in the reason for the provision in Rule 38(d) which provides that a demand for a jury once made cannot be withdrawn without the consent of the opposing party, then in all logic it ought to be as important a factor when a trial by jury is waived and neither party requests it. See *Moore's Federal Practice*, Vol. 5, Sec. 38.45, pp. 343-344. Even assuming that the Court had the authority to call a jury in the absence

of a motion by appellees, appellant was entitled in all fairness to a reasonable amount of advance notice. See *Ford v. Wilson Co.,* 30 F. Supp. 163, 166.

2. The Prejudicial Nature of the Court's Error.

It will, undoubtedly, be asserted by appellees that this ground cannot be claimed as error justifying a reversal for the reason that appellant was not prejudiced because the issue as to liability was decided in its favor. But this was, at the most, a mere hollow victory when one considers that appellant recovered no damages at all—not even the costs of suit. Hence, appellant submits that there was prejudice in this respect.

If this case had been tried by the Court, rather than by a jury, the Court would have been obliged to make specific findings of fact on the question of damages, and the absence of findings on that question would have been error because substantial. *Pacific American Fisheries v. Mullaney,* 191 F. 2d 137, 141 (CA-9 1951); *Owen v. Commercial Union Fire Ins. Co.,* 211 F. 2d 488 (CA-4 1954).

Assuming that the District Court's instruction on this point adequately disclosed the issues of fact that were before the jury, it cannot be truthfully said that upon a review of the evidence presented this appellate Court could possibly reach the same result as the jury did on that question. Appellant's loss of profits to which it was entitled if appellees' breach of contract was inexcusable was clearly established and uncontradicted; no reviewing Court could say that the proof

in this regard conceivably could give appellant as damages only $368.70—the exact amount of the admitted counterclaim. Thus, the reviewing Court could not waive the defect of an absence of findings on this point.

If the District Court had made findings of fact, as it ought to have done, then upon appeal this Court could review those findings and state whether or not the findings of fact on appellant's loss of profits were in accord with the evidence. This is because the findings of a Court are subject to a complete type of equity review—both of fact and of law. See *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 394-395. This is a much broader type of review than is permitted where a jury's "findings" are considered on an appeal. In the latter type of case the kind of review is much more restricted, and where, as here, the question is as to the inadequacy of damages, it is not enough merely that there is proof that the amount of damages awarded is "substantially" less than what was established by the evidence. The inadequacy, according to decisions of this Court, must be shown to be "gross." See *Southern Pacific Co. v. Guthrie* (C.A.-9, 1951) 186 F. 2d 926, 932-933.

In the non-jury case this reviewing Court can make its review broad in scope, and reverse if the findings of the trial Court are not supported by the evidence or are against the weight of the evidence. In the jury case, however, all that this reviewing Court can do is to say whether the action of the trial Court in denying a motion for a new trial which is based upon

a verdict being against the weight of the evidence has abused its discretion; and where inadequacy of damages is in question, the reviewing Court will not find such an abuse of discretion unless the verdict is "grossly" inadequate. *Southern Pacific Co. v. Guthrie,* supra. Therefore, appellant submits that in this respect the error of the District Court in ordering that this case be tried by a jury was substantial and prejudicial to appellant.

II. THE DAMAGES AWARDED BY THE JURY WERE GROSSLY INADEQUATE.

Assuming, for the sake of argument that this action was properly tried by a jury, it is the position of appellant (1) that the issue of liability was correctly determined (that appellees had breached the contract without justification) when the jury rendered its verdict in favor of the appellant (R. 35), and (2) that appellant's loss of profits, or damages, in the amount of $21,489.57, was so conclusively proved that the action of the jury in awarding the appellant only the sum of $368.70 was a ground obligating the District Court to grant appellant a new trial on this aspect of the case.

1. The Record Established Appellant's Damages Beyond Dispute.

It was not disputed that under the contract the basic rate which appellees agreed to pay appellant for its daily news report started at $38.17 a week (R. 7,

88), and that throughout the term of the agreement this rate was increased by assessments made from time to time, as follows:

January 6, 1946	$1.15
December 29, 1946	3.05
January 4, 1948	3.09
January 9, 1949	2.06
January 7, 1951	4.75
May 3, 1953	4.18
Total	$18.28

(R. 92-95.)

These assessments were made by appellant, and appellees agreed to pay them, by virtue of the provisions of Paragraph Second, Clause 2 of the contract (R. 7-8, 88-89); and they represented general overhead expenses of appellant attributable to its entire business which were levied pro rata among all of appellant's clients based upon each client's weekly rate. This was clearly established by the testimony of David Belnap, the Northwest Manager for United Press Associations (R. 65-66, 190-191), and by Carl B. Molander, the Assistant General Sales Manager for United Press (R. 89-92), and appellees made no attempt to contradict these witnesses nor did they offer any evidence controverting these facts. Hence, on February 14, 1954, the date upon which appellees breached and repudiated the contract (R. 5, 59, 88, 239), the basic rate for the service rendered appellees had been increased by assessments totaling $18.28, and was then the total sum of $56.45 a week.

It is true that the actual rate then being paid by appellees on February 14, 1954, was $61.45 a week, or $5 more than the basic rate of $56.45. This, however, is readily explained, and there is no necessity for any confusion on this point. In order to satisfy demands of appellees for a more efficient type of news service, appellant employed a teletype operator to send the news reports from Seattle to appellees' newspaper in Ketchikan, Alaska, and appellees agreed that in addition to the basic contract rate of $38.17, they would pay the further sum of $52.50 a week toward the Seattle teletype operator's salary. (R. 14-15, 89, 222-224.) Later, at the insistence of appellees, appellant agreed to absorb $27.50 of such operator's salary, based upon a figure of $52.50 a week (R. 15-16, 89, 228-229), which meant that appellees' contribution to that expense of appellant was then $25 a week. Finally, on February 21, 1950, a "Modification of Agreement" was made by the parties (R. 17-18) and here appellant reduced the overall rate then being paid by the further sum of $20 a week. This $20 reduction could be considered as a further offset against appellees' contribution of $25 toward the salary of the Seattle teletype operator, and this then meant that after February 21, 1950—and on February 14, 1954, the date of appellees' breach of contract—appellees' contribution to this salary expense was only $5 a week. (R. 92-95.)

In computing this loss of profits—or damages—arising from appellees' breach of the contract, appellant considered this $5 item as appellees' contribution

toward the teletype operator's salary, and thus eliminated it from anticipated profits. (R. 94-95.) Hence, this sum was subtracted from the actual rate being paid by appellees at the time of breach, i.e., $61.45, and this then left the sum of $56.45 as the basis for computation of the loss of profits. (R. 95.) This same figure is reached by adding to the original basic rate of $38.17 the total of the general assessments made, that is, the sum of $18.28.

The basic rate to be paid by appellees under the contract at the time they repudiated the agreement being $56.45 a week, appellant's loss of profits, or damages, were to be computed on the basis of this figure, less the expense of furnishing the news report to appellees. This, as Mr. Molander has shown, was $8.66 a week—this representing the cost of renting a teletype machine and the cost of paper. (R. 95-96.) There was no saving to appellant as far as the teletype operator's salary was concerned. This was clearly shown by Mr. Belnap when he brought out in his testimony these facts: that at the time appellees breached the contract, i.e., on February 14, 1954, appellant's Alaska business required the services of two teletype operators in Seattle, whose salaries were paid by appellant; that the total costs to appellant for these two operators, which represented their total gross wages, was $308.04 per week; that the total gross revenue received by appellant from its Alaska business was $306.24 per week; and that after appellees' termination of the contract, and the news report was no longer being sent to the Ketchikan Daily News, there

was no saving to appellant in respect to operators' salaries, for the reason that the same two teletype operators had to be kept on for the remainder of appellant's Alaska business at their full salary. (R. 62-64.)

Consequently, the computation of appellant's loss of profits arising by reason of appellees' breach was a matter of simple mathematics: the basic rate ($56.45), less the cost of maintaining the news service to appellees ($8.66), multiplied by the number of weeks that the contract had to run at the time of breach (449 4/6 weeks). (R. 95-98.) Hence, appellant's damages for breach of contract here were $21,489.57. (R. 96-97.)

2. Appellant's Damages, as a Matter of Law, Could Not Be Disputed.

What appellant is entitled to in the way of damages is the value of the contract, for appellees cancelled the agreement and thereby prevented appellant from collecting the revenue to which it was entitled thereunder. The contract is express in its terms in that it provides for certain weekly payments over a period of time which is likewise certain, and those payments are neither remote nor speculative in any degree. Appellant is therefore entitled to recover what it would have received, diminished only by the expense that would have been required of it to furnish its news report to the appellees for the balance of the term. That expense, which is properly deductible from the contract price, can only be that which

appellant would have *saved* by reason of not being required to complete performance for the full term of the agreement. And it has been clearly shown that all that appellant would have saved—the only expenses that would have been incurred in furnishing the news report to appellees—was $8.66 per week. (R. 95-98.)

The assessments levied from time to time pursuant to the provisions of Paragraph SECOND, in the total amount of $18.28 per week, are referable to the appellant's overall business, and are not referable to this particular contract and are not deductible from the contract price. They are part of the general overhead expenses of appellant in maintaining and furnishing its services to all of its clients and were levied pro rata among all of such clients based upon each client's weekly rate. These expenses continue regardless of whether appellant is serving appellees or not, and thus appellant has saved nothing in this respect by not being required to furnish the news reports to appellees for the balance of the term.

This principle is inherent in the case of *Star-Chronicle Publishing Co. v. U.P.A.,* 204 F. 217 (CA-8, 1913). There, in a case involving breach of a similar type of contract, it was argued that in computing UPA's profits there should be deducted from what UPA was entitled to receive under the contract, not only the expense of maintaining the St. Louis office, but also a relative portion of the expense of the entire business of plaintiff. The Court, in holding against such contention, said (pp. 223-224):

"The evidence discloses that the only extra expense to which plaintiff was put in performing its contracts with defendant was the local expense incurred in maintaining the St. Louis office. All other expense incurred by it was the same after defendant ceased to accept the news."

Also, in another very similar case involving United Press Associations, the same point was covered. In *UPA v. McComb Broadcasting Corporation,* 28 So. 2d 575 (Miss. 1947), the Court had this to say (p. 576):

"* * * The association was entitled to the net profits which it thereby lost, computed upon the basis of the unexpired term of the contract. * * *

"Proof of anticipated profits was adduced by the southern division business representative of the association having supervision over the area in which the station was located. His testimony was uncontradicted that the gross rentals due the association were $45.85 per week, and that the expense of furnishing such services was $21.83 per week. Such expenses allocable to the station's services were broken down in detail. The net profit to accrue to the association was therefore $24.02 per week for 71 weeks, or $1,705.42.

"That such lost profits were properly computed, and should have been awarded, is sustained by established authority, typical examples of which are above cited. The attack upon the correctness of the award is directed to the failure to include in the expenses *deductible from gross profits an allocated portion of the general overhead expenses of the association in maintaining*

> *and furnishing its services.* Such attack is met by the requirement, born of practical considerations, that the defaulting party may not hold the promisee to more than a reasonable detail. Engle v. Mahlen, supra. In Star Chronicle Publishing Co. v. United Press Ass'n, supra, the trial court, in considering this question in a case strikingly similar to the case at bar in all its phases, had instructed the jury to fix damages for anticipated profits, if found, upon the basis of the contract price and the cost of maintaining the office of the appellant. * * * The testimony of the association's representative was clear, concise, and certain. There was flat assertion that the deductions included the entire expense incurred or required to service the station. We therefore amend the decree to allow recovery of such lost profits." (emphasis added.)

See also *Burd v. Campbell Hosiery Co.,* 28 Atl. 2d 365, 366 (Pa. 1942); *United States v. Behan,* 110 U.S. 338, 344-347; *Wicker v. Hoppock,* 73 U.S 94, 99.

It certainly does not lie in the mouths of appellees, who breached the contract, to claim that in computing damages appellant has to deduct from the contract price an allocated portion of the general overhead expenses of appellant in respect to its entire business. The appellees' anticipatory breach of contract estops them from claiming that anything more is deductible from the contract price than the appellant's actual savings due to its being relieved from the burden of performing the contract over the entire period thereof. *American Can Co. v. Garnett,* 279 F. 723, 727 (CA-9, 1922); *United States v. Behan,* 110 U.S. 338, 345-347.

Under these authorities it is inconcievable how it could even be considered that the several assessments totalling $18.28 are "costs" and therefore deductible in computing profits. Appellant was burdened with these same items of expense even after appellees had ceased to receive the news service, and appellees' breach of its contract, which expressly provided that they bear their proportionate share of the expenses, put it beyond the power of appellant to collect them from appellees. Appellees should, therefore, bear the burden of this particular expense as the result of their breach. Appellant had lost the $18.28 a week (along with the original basic rate of $38.17) which it otherwise would have collected from appellees as their just proportion of that expense. Certainly, appellant is entitled to recover any losses occasioned or proximately caused by the appellees' breach.

The same principles also prevent appellees from claiming that since appellant's gross revenue from its Alaska business was $306.24, and the cost of teletype operators for such business, $308.04, that appellant was thus losing money and therefore entitled to no "profits." The complete answer to any such contention, as in the case of the $18.28 in assessments, is that no saving resulted to appellant in respect to a teletype operator's salary when service to appellees was ended. Mr. Belnap testified that the day operator who transmitted the file to the Ketchikan Daily News received $144.48 per week, and that after appellees discontinued the service, this operator still had to be retained for other Alaska business at the same salary.

(R. 61-64.) Thus, not only was there no saving to appellant, but that portion of the operator's salary, which appellees had agreed to pay in addition to the basic rate plus assessments, was an additional expense which appellant had to absorb after the appellees discontinued service.

In line with the *Star-Chronicle* and *McComb* cases, supra, appellees can take nothing from the fact that appellant's Alaska business or its business as a whole was profitable or unprofitable. All that is involved here is this particular contract, and appellant's damages are measured by the value of the contract alone, and not by any standard of what UPA receives from its other Alaska clients or by whether those receipts were profitable or unprofitable in the overall operation. UPA has profitable contracts and unprofitable contracts in its business, and it may very well be that its Alaska business as compared with its continental business is generally unprofitable. But appellees, who breached the contract, certainly should be estopped from raising these questions; for all that is involved in this case is what appellant has lost by reason of appellees' breach of this particular contract. See *American Can Co. v. Garnett,* 279 F. 723, 727. Appellant is entitled to any losses occasioned or proximately caused by appellee's breach, and entirely aside from whether its Alaska business is operating at a profit or not.

From these things it is apparent that the damages awarded by the jury were so wholly inadequate that the trial Court's denial of appellant's motion for a

new trial on the issue of damages could not have been in the exercise of a reasonable discretion.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL ON THE ISSUE OF DAMAGES.

Still assuming, arguendo, that this case was properly tried by a jury, there is abundant reason to reverse the judgment because of the abuse of discretion in the Court below in refusing to grant appellant's request for a new trial on the issue of damages. That abuse of discretion relates to the damages awarded by the jury—the position of appellant being that the amount awarded was so wholly inadequate and so entirely inconsistent with the uncontradicted evidence as to make it manifest that this part of the verdict resulted from a complete disregard by the jury of the Court's instructions, which creates an inference of prejudice against appellant.

Instruction No. 4 of the Court's Instructions to the Jury tells the jury that if they find that appellees wrongfully breached the contract, they may allow appellant damages for the period February 15, 1954 to September 27, 1957, in an amount equal to the amount that appellant would have earned during that period, less the amount it would have cost the appellant to perform the contract, and less the sum of $368.70—the amount of appellees' counterclaim. (R. 30.) This Instruction further informs the jury of the various factors they may consider in determining the amount

of damages. (R. 30-31.) The Instruction then continues that if the jury should find that appellant failed to furnish appellees with the news agreed upon, the jury would be warranted in finding that appellees were justified in rescinding the contract and that the verdict should then be for appellees. (R. 31.)

Under this Instruction the jury had one of two choices: (1) either to find for appellant and award damages, or (2) to find for appellees, in which case appellant would be entitled to no damages. And if the verdict was to be in appellant's favor, then the damages would of necessity be substantial; for as pointed out in Part II of this brief (supra), the amount that appellant would have earned during the unexpired term of the contract and the cost that it would have been put to in performing the contract were so conclusively established by the evidence that as a matter of law the jury was obligated to simply make the mathematical computation of multiplying appellant's weekly net profit by the number of weeks that the contract had to run—and thus arrive at the figure based upon the proof adduced, proof over which there was no controversy.

Consequently, although the jury found in appellant's favor with respect to liability, it did not assess appellant's damages in the manner directed by the Court's Instructions. It thus completely ignored such Instructions and failed to perform its task of assessing damages. The conclusion, then, is inescapable that the verdict so far as damages were concerned was not motivated by the evidence, but rather was the

result of capricious and arbitrary action, in total disregard of the evidence, thus giving rise, on its face, to an inference of prejudice on the part of the jury. Under these circumstances the trial judge ought to have granted a new trial, and his failure to do so was an abuse of discretion—an error of law.

United Press Associations v. National Newspaper Ass'n, (CA-8, 1918), 254 F. 284, 286; *Reisburg v. Walters,* 111 F. 2d 595, 598 (CA-6, 1940); *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,* 191 F. 2d 302, 310 (CA-7, 1951), certiorari denied, 346 U.S. 867; *Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.,* 97 F. 2d 481, 485 (CA-9, 1938).

It is submitted that the inadequacy of damages here is in the true sense of the term "gross," and thus that the action of the Court below in denying appellant's motion for a new trial must be reversed by this Court. *Estabrook v. Butte, Anaconda & Pacific Ry. Co.,* 163 F. 2d 781-782 (CA-9, 1947); Cf. *Covey Gas & Oil Co. v. Checketts,* 187 F. 2d 561, 562-563 (CA-9, 1951); *Cobb v. Lepisto,* 6 F. 2d 128, 129 (CA-9, 1925); *Baldwin v. Warwick,* 213 F. 2d 485, 486 (CA-9, 1954).

IV. ERRORS IN THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY WERE PREJUDICIAL AND JUSTIFY THE GRANTING OF A NEW TRIAL.

It is the position of appellant that the District Court, in Instruction No. 4, gave erroneous instruc-

tions to the jury in these two instances: (1) in r
ducing the term of the contract by a period of fi
years (R. 30), and (2) in permitting the jury to co
sider certain elements in its determination of tl
amount of damages to be awarded appellant. (R. 3
31.) Both of such errors were prejudicial to appella
and justified the granting of a new trial.

1. The Instruction on the Term of the Contract.

Over the objections of appellant, the Court i
structed the jury as a matter of law that the term
the contract between appellant and appellees e
pired on September 27, 1957, rather than, as appe
lant has always claimed, five years later, that is,
September 27, 1962. This, appellant maintains, w
error.

The history of the contract, as shown by the ev
dence (see Exhibit A attached to appellant's co
plaint (R. 6-18) and the deposition of Carl Molander
(R. 84-86, 95) and as it relates to the ultimate expir
tion date of the contract, is this:

(a) The original agreement went into effe
on October 3, 1945, and was for a period of thr
years, i.e., until October 3, 1948. (R. 10, 84.)

(b) On October 3, 1948, notice of terminatio
not having been given pursuant to Paragrap
EIGHTH, (R. 10, 84-86) the term was extende
for an additional five-year period, i.e., until O
tober 3, 1953.

(c) On February 21, 1950, the parties entere
into a "Modification of Agreement," under th

terms of which appellant agreed to suspend the then existing rate and reduce it by $20.00 per week, with the provision that either party could terminate such suspension on thirty-days' notice. Clause 3 of this "Modification of Agreement" reads as follows:

> "3. The term of the agreement between the parties shall be extended by the length of time during which the above suspension is in effect." (R. 17-18.)

(d) On October 3, 1953, the contract was still in effect, no notice of termination having been given pursuant to Paragraph EIGHTH. (R. 85-86.)

(e) On February 14, 1954, appellees breached and terminated the contract by refusing to accept service thereunder. (R. 88, 239.) This, of course, also constituted a termination of the "Modification of Agreement" of February 21, 1950, and as of the date of such termination, February 14, 1954, the rate suspension under the Modification had been in effect for a period of four years less five days.

In view of these facts, appellant's contention is that on October 3, 1953, the contract was automatically renewed by its express terms for an additional five-year period, i.e., until October 3, 1958; that on the date of termination, February 14, 1954, the "term of the agreement," within the meaning of Clause 3 of the Modification of Agreement, was a term which expired on October 3, 1958; and that since on February

14, 1954, the rate suspension under the Modification
Agreement had been in effect for a few days less th
four years, the "term of the agreement" which w
to expire on October 3, 1958, was thus extended
virtue of the provisions of the Modification of Agr
ment for an additional period of nearly four years
that is until September 27, 1962.

On the other hand, the Court in instructing the ju
on this subject, (R. 30), although recognizing the a
tomatic renewal date of October 3, 1953, simply
nored Paragraph EIGHTH of the contract where
the term would thus be extended for another five-ye
period, that is until October 3, 1958, and simply add
on, commencing October 3, 1953, the period duri
which the rate suspension was in effect—thus maki
the expiration date September 27, 1957, rather th
September 27, 1962—a difference of five years.

The Court's interpretation was not logical. If t
Modification of Agreement had not existed, then t
Court would have had to admit (since it recogniz
the automatic renewal date of October 3, 1953), th
the contract, by its express terms, would have be
extended at that time for an additional five-ye
period, and that when appellees terminated the co
tract on February 14, 1954, that period would n
have expired until October 3, 1958. It simply is n
reasonable to thus construe the Modification of Agr
ment as shortening the minimum that appellant w
entitled to under the terms of the original agreeme
rather than extending it; and yet that is precise
what the Court did.

This cannot be correct. The "term of the agreement," referred to in Clause 3 of the Modification of February 21, 1950, must have meant the "term" as it existed as of the date of termination of the Modification, i.e., when appellees breached the contract on February 14, 1954. "Term" means a "limited or definite extent of time; the time for which anything lasts; duration; tenure" (See Webster's Dictionary), and on February 14, 1954, the time for which the original agreement was to last—its duration—was until October 3, 1958, since it had been automatically renewed for a five-year period on October 3, 1953. This was the "term of the agreement" which, by virtue of the provisions of the Modification, was extended by the length of time the rate suspension under such Modification was in effect.

There is no ambiguity here; no room for the strained construction adopted by the Court; no reason to believe that the parties did not mean exactly what they said. Under the Modification of Agreement appellant gave appellees a substantial rate reduction, and the parties must reasonably have intended that appellant was to receive some value for this. This value, or consideration, was that appellees would bind themselves to the agreement for a period of time longer than that provided for in the original contract. But if the District Court's interpretation is followed, appellees would have all of the advantage, and appellant none.

The agreement, thus interpreted by the lower Court, is not only inequitable and unjust as far as appel-

lant is concerned, but is also absurd for the reas
that it is contrary to common sense to believe th
appellant would have made a substantial rate red
tion and would receive nothing in exchange. If am
guity exists and construction is necessary and jus
fied, which appellant does not admit, then a rule
construction should be preferred which would ma
the entire agreement, that is, the original contra
plus the Modification of February 21, 1950, ratio
and not contradictory of its general purposes. See
Am. Jur. 792, Sec. 250; *Lescher & Sons Rope Co.*
Mayflower Gold Mining and Reduction Co., 173 F
855, 857. That construction of a contract which affo
protection to both parties, rather than only to o
should be favored. See *Knight v. Hamilton,* 313 F
858, 233 SW 2d 969; *Jenkins v. Anaheim Sugar C*
247 Fed. 958, 960.

2. Instruction on Elements of Damages to Be Considered.

As part of its Instruction No. 4 the Court told
jury this:

> "In determining the amount of damages, if y
> find that plaintiff is entitled thereto, you m
> consider . . . the probability of change during
> period referred to in the rates, the cost of do
> business, and the margin of profit . . . " (R.
> 31.)

This portion of the Instruction was erroneous
only because it was too broad, but also because it
confusing and conducive to improper speculation
the part of the jury. It does not clearly instruct
jury that appellant's lost "profits", or damages,

the contract price, less the expense of furnishing the news report to appellees for the balance of the term of the contract. It has been pointed out in this brief (see Part II, supra) that the contract price and the cost of furnishing the news service to appellees for the balance of the contract term were specific, definite amounts, and established by uncontradicted evidence; and that as a matter of law the difference between the two figures was the measure of appellant's lost profits, or damages. See *UPA v. McComb Broadcasting Corp.,* 28 So. 2nd 575, 576 (Miss. 1947); *Star-Chronicle Publishing Co. v. UPA,* 204 F. 217 (CA-8, 1913). But the Instruction did not make this clear; it failed to point out that the "cost" or expense that may be deducted from the contract price in determining net lost profits is limited solely to those items relating specifically to the performance of the contract and could not include the expense of a Seattle teletype operator or other general expenses of appellant in maintaining its Alaska business. Because, then, of these principles, inherent in the *McComb Broadcasting Corp.* and *Star-Chronicle* cases, supra, the Court was bound to be more specific in its Instructions, and not to have instructed the jury to consider generally "the probability of change . . . the cost of doing business, and the margin of profit . . ." (R. 30-31.)

Finally the Court also instructed the jury that in determining the amount of damages it could consider—

> " . . . The probability or improbability that the defendants would remain in business." (R. 31.)

This was error because it constituted an instruct
on the impossibility of performance of the contr
by the appellees if they went out of business dur
the unexpired term of the agreement. Subjective
possibility, or inability to perform because of pove
loss of money or inability to obtain money, does
excuse nonperformance of a contract. In order to
lieve appellees from performance of their contr
because of impossibility, the impossibility must
inherent in the nature of the act to be performed,
not consist of the personal inability of appellees
carry out their bargain. The latter type of "imp
sibility", which is purely subjective, was what
Court was presumably instructing on, and since
does not discharge a duty created by contract, it
erroneous. See 12 Am. Jur. "Contracts", Sec. 3
Restatement, Contracts, Vol. 2 Sec. 455; *Williston*
Contracts, Rev. Ed., Vol. 6, Sec. 1932, pp. 5411-5
The burden was on appellees to establish a defens
excusable impossibility, if they could, and the rec
shows that they did not even suggest that such a
fense existed. See *Williston,* supra, Sec. 1937, p. 5

3. Conclusion.

The jury, in rendering its verdict in favor of ap
lant, found that appellees had wrongfully breac
the contract—were not justified in rescinding it. O
that decision had been made, then had the jury b
instructed properly on the element of damages
could only have determined, in the light of the pr
adduced at the trial, that appellant's loss of pro
would be the weekly contract price at the time of
breach ($56.45), less the cost of performing the

tract ($8.66), multiplied by the number of weeks that the contract had yet to run (449 4/6). (R. 95-96.) As a matter of law the District Court erred in not correctly instructing the jury on this aspect of the case, and it is manifest that this failure on the part of the trial judge could well have led to the absurd result where the damages awarded appellant were exactly equal to the amount of the admitted counterclaim of appellees. The gross inadequacy of the verdict, then, could well have been the result of erroneous instructions by the Court below, and this alone would be sufficient reason for this reviewing Court to reverse the action of the trial Court in denying appellant's motion for a new trial. See *Chesapeake & Ohio Ry. Co. v. Gainey,* 241 U. S. 494, 496 (1915); *Legler v. Kennington-Saenger Theatres, Inc.,* 172 F. 2d 982, 984 (CA-5, 1949).

V. A NEW TRIAL SHOULD BE LIMITED TO THE ISSUES OF DAMAGES.

Appellant's case was that appellees breached the contract without justification, and the only defense that was relied on by appellees at the trial was that appellant had itself breached the contract by failing to furnish an adequate news report. When the jury returned a verdict for the appellant, it must have determined from the evidence presented that the appellant had kept its part of the bargain, and therefore, that appellees' renunciation of the contract was not excusable.

The facts in this case upon which such determination was based could have no conceivable connection

with the elements of proof required for a computati
of appellant's damages, i.e., the amount of money th
it lost by reason of appellees not accepting the serv
under the contract for the balance of the unexpi
term thereof. Hence, the two issues in this case—c
of liability and the other of damages—are distinct a
separable, and not so inextricably related so that
proper verdict on the latter cannot be reached witho
taking into account the evidence relating to the f
mer. Evidence proving appellees' unjustified brea
cannot have the slightest bearing on the amount
profits that appellant has lost by reason of the brea
Therefore, the issue of damages can be retried alo
without any injustice. In fact, it would be an injust
and unduly burdensome to compel appellant to re
the issue of liability in view of the jury's verdict
its favor on that issue, the correctness of which app
lant does not challenge. *Yates v. Dann,* 11 FRD 3
(D. C. Del. 1951); *Greater American Indemnity Co.*
Ortiz, 193 F. 2d 43, 47 (CA-5 1951); *Washington G*
Light Co. v. Connolly, 214 F. 2d 255, 256 (CA-I
1954). Cf. *Gasoline Products Co., Inc. v. Champ*
Refining Co., 283 US 494, 498-500.

**VI. RATHER THAN GRANTING A NEW TRIAL, THIS COU
SHOULD DIRECT THE ENTRY OF JUDGMENT FOR APP
LANT IN THE UNDISPUTED AMOUNT.**

The jurisdiction granted the federal Appella
Courts is broad, Section 2106 of the Judicial Co
(28 USCA Sec. 2106) providing as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Hence, in dealing with a judgment of a District Court, this Court is not limited to remanding, with directions to award a new trial, but has the authority in a proper case to render a correct judgment after a reversal of the judgment of the trial Court.

It is appellant's position that this is what ought to be done here, i.e., that the judgment below should be reversed for the reasons heretofore stated, and that this Court should then proceed to enter, or direct the entry of, a judgment in favor of appellant for the undisputed amount of damages to which appellant is entitled. And, in taking this stand, appellant is not asking the Court to employ the device of *additur* which, under substantial federal authorities, is not favored. *Dimick v. Schiedt,* 293 US 474, 475 (1935); *Moore's Federal Practice,* Vol. 6, p. 3752, Sec. 59.05(4); id. p. 3840, Sec. 59.08(6). *Additur* assumes a dispute as to the amount of damages; and as has already been pointed out in this brief the correct amount of damages to which appellant was entitled cannot be disputed but is a mere matter of calculation.

It has already been shown in this brief that the contract is express in its terms in that it provides for

certain weekly payments over a period of time th
is likewise certain, and that those payments are n
ther remote nor speculative in any degree. The tes
mony of appellant's witness, Mr. Molander, was u
contradicted that had appellant been required to fu
nish its news report to the appellees for the balar
of the unexpired term, appellant would have receiv
the sum of $56.45 per week, less costs of furnishi
service in the amount of $8.66, or a net amount
$47.79 per week. (R. 95-96.) Likewise, it was ind
putably established that appellees breached the co
tract on February 14, 1954, and as of that date t
unexpired term of the contract was a definite numb
of weeks. (R. 95.) The testimony on both of the
matters was clear, concise and certain, and appell
made no attempt either by affirmative proof or
way of impeachment or contradiction to dispute the
facts. Hence, the ascertainment of appellant's da
ages becomes merely a matter of mathematical co
putation, i.e., the sum of $47.79 multiplied by t
number of weeks that the contract still had to ru
According to appellant's construction of the Modifi
tion of Agreement of February 21, 1950 (R. 17-1
the number of weeks remaining was 449 and 4
(R. 95) and thus appellant's damages amounted
$21,489.57.

Under the evidence, then, appellant was entitled
$21,489.57, if it was entitled to anything, and sin
the jury properly determined liability in favor
appellant, the amount awarded was simply less th
that which was undisputed. And since this amou

was not factually in dispute, there is nothing to prevent this Court from rendering judgment in favor of appellant for the undisputed amount. This would not violate the rule against *additur,* for there is no real factual issue on the question of damages to be tried. The Court would not be substituting its own judgment for that of the jury but would be merely adding to the verdict that amount of lost profits which appellant is entitled to as a matter of law. *Stanton Electric Mfg. Co. v. Klaxon Co.,* 125 F. 2d 820, 825, 826 (CA-3, 1942); *Marshall v. Equitable Life Assurance Society,* 116 F. 2d 901, 903 (CA-6, 1941); *United States v. Illinois Surety Co.,* 226 F. 653, 664 (CA-7, 1915); *UPA v. McComb Broadcasting Corp.,* 28 So. 2d 575, 576 (Miss. 1947); *Moore's Federal Practice,* Vol. 6, pp. 3748-49, Sec. 59.05(3); id. p. 3755, Sec. 59.05(4); id. p. 3804, Sec. 59.08(4). Cf. *Garfield Aniline Works v. Zendle,* 43 F. 2d 537, 538 (CA-3, 1930). See also: *Wilson v. Brown,* 136 Va. 634, 118 S.E. 88, 90 (1923); *Citizens' Nat'l Bank v. Joseph Kesl & Sons Co.,* 378 Ill. 428, 38 NE 2d 734, 737 (1941); *Oliver v. Crane,* 182 Or. 166, 161 P. 254, 255 (1916); *Mystic Tailoring Co. v. Jacobstein,* 94 Colo. 306, 30 P. 2d 263, 264 (1934).

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed, and that this case should be remanded with directions to enter judgment in favor of appellant in

the sum of $21,489.57, together with appellant's co
and attorneys' fees.

Dated, Juneau, Alaska,
January 25, 1956.

JOHN H. DIMOND,
BAKER, HOSTETLER & PATTERSON,
DONALD D. WICK,
Attorneys for Appellant

No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS, a corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLEES' BRIEF.

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No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS, a corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

On or about June 30, 1945, the appellees, Sidney Dean Charles, Paul S. Charles, and Patricia Charles, a copartnership, doing business under the name of "Alaska Fishing News", entered into a written contract effective Oct. 3, 1945 with the appellant United Press Associations, a corporation, engaged in the business of accumulating and disseminating news reports and furnishing them to newspapers and radio stations throughout the country (R. 6-12). This

contract was prepared by the appellant on a printed form. The appellee Pioneer Printing Company, an Alaska corporation, is the successor to the Charles partnership, and in about April, 1948, this corporation took over the ownership and publication of the Alaska Fishing News, which was thereafter called the "Ketchikan Daily News" (R. 106). The contract which is the subject of the suit provided for a three year term, which was to be automatically extended for a period of five years unless notice was given within the time prescribed therein, by either party of an intention to terminate it. The prices to be paid for the service increased from time to time and many complaints were made of these increases and of the service. On February 21, 1950, a modification of the agreement effective Feb. 19, 1950 was executed by appellant and the Alaska Fishing News, although the Alaska Fishing News had ceased to exist at that time and the business had in 1948 been taken over by the corporation, Pioneer Printing Company, but the Pioneer Printing Company continued to abide by the terms of this modification which contained a slight reduction in cost for the service to be furnished (R 17, 18). It was provided that the original agreement between the parties should be extended by the length of time during which the suspension or modification of February 21, 1950, should be in effect. Modification effective Feb. 19, 1950.

The second term of the original contract would have expired on October 3, 1953. However, the modification went into effect on February 19, 1950, so that

when the time came within which either party could have cancelled the contract under the provisions of Paragraph Eighth of the original contract, which would have been on October 3, 1953, the modification had already been in effect more than three years, so that the expiration date or the date on which the original contract could have been cancelled had been extended for three years beyond October 3, 1953.

The appellees were publishing at Ketchikan, Alaska, a daily newspaper and depending upon the appellant for its news services, which included not only the news from the United States and the world in general but also Alaska news. Numerous complaints were made by the appellees to the appellant of the quality of the news service. These complaints were made by letter, by telegrams and in person to the Pacific Coast managers of the appellant. Some of the complaints were sent to the New York headquarters of appellant. There was a rival newspaper in Ketchikan, namely, the Chronicle, which was publishd daily and which was receiving news through the Associated Press. Many news items were going constantly to the Chronicle, news of great importance to the readers of the appellees' paper, which were not received by the appellees through its news service. These included not only news from the United States and the world but also important Alaska news. In fact, one of the appellant's correspondents in Juneau, Alaska, frequently sent as many as five or six articles in one day to the rival Chronicle, none of which were furnished through the United Press or otherwise to the appel-

lees. The record will show that many of the complaints made by appellees to the appellant, regarding this neglect or refusal to furnish the news service contemplated, were acknowledged by appellant and the record shows that on several occasions the appellant promised in writing to correct the defects in its service so as to adequately perform its part of the contract (R. 131-246). This, however, was not done and appellees were obliged to resort to a considerable additional expense in order to compete with the rival paper because of its lack of news which should have been furnished by appellant under the terms of the contract (R. 118-9). Finally appellees were obliged to make a contract with Associated Press also in order to get the news service (R. 118-9).

On February 14, 1954, the appellees notified appellant that because of the unsatisfactory service and the high prices which they had to pay for that service which was away beyond the original sum set forth in the contract, they were cancelling the contract. The record will show that this was done because of appellant's refusal to perform the terms of the contract as agreed upon. The service was thereupon discontinued.

On April 23, 1954, appellant began this action demanding judgment against the appellees for $21,489.57, representing appellant's claimed loss of profits. It was alleged in the complaint that the appellees had breached the contract. The claim for damages $21,489.57, is alleged to have covered anticipated profits from February 14, 1954, to September 27, 1962

The appellees answered the complaint of appellant setting up, in addition to the admissions and denials, three affirmative defenses and a counterclaim in the sum of $368.70. On June 4, 1954, appellant served and filed its reply to the counterclaim. Up until that time no jury had been requested for the trial of the case, but on August 5, 1954, appellees moved for a jury trial under the provisions of Rules 38(a) and 39(b) of the Federal Rules of Civil Procedure (R. 24). The court denied this motion (R. 25, 46 and 47). The court's denial was based upon a practice instituted by the judge of the Third Judicial Division, which had been followed by Judge Folta in the First Division.

Thereafter the case was set for trial before the court at Ketchikan on April 13, 1955.

On April 11, 1955, Judge Folta announced that he would summon a jury to try the case and submit to the jury the questions of fact. Appellant objected to the calling of a jury at that time, and the following day, on April 12, 1955, the judge entered a written order giving his reasons for calling the jury (R. 25). Counsel for the appellant, while objecting to the calling of the jury, made no motion or request for a continuance of the trial. He stated that he was taken by surprise and if he had known the jury was to be called, he would not have taken certain depositions but would have had the witnesses present in person.

The case then proceeded to trial before the jury on April 13, 1955. At the trial the appellant admitted

appellees' counterclaim in the sum of $368.70. Two forms of verdict were submitted by the court to the jury (R. 35, 36). The jury signed verdict No. 1 giving the plaintiff damages in the sum of $368.70, but offsetting against that the sum of $368.70, which was the amount claimed by the defendants in their counterclaim and admitted. The effect of this verdict was to give neither side anything.

The record shows that plaintiff-appellant made no motion for an instructed verdict and took no exceptions to the court's instructions save one, which is an exception to that part of Instruction 4 which instructs the jury to the effect that the terms of the contract under the circumstances would have expired on September 27, 1957, rather than September 27, 1962, as claimed (R. 205).

Thereafter appellant filed its motion under Rule 59 of the Federal Rules of Civil Procedure requesting the court to set aside the judgment which had been entered on the jury's verdict on April 22, 1955, and to make its own independent findings of fact and direct entry of judgment for appellant in the amount sued for or, in the alternative, to order a new trial (R. 29, 40). The court denied this motion by a minute order entered May 20, 1955 (R. 41). The plaintiff-appellant thereupon took an appeal to this court.

The appellant's statement of points to be relied upon in this court are found on pages 268 and 269 of the record. This statement of points is about identical with appellant's specifications of error contained in

its brief. We shall discuss these points in the order in which they are stated by appellant (R. 268, 269).

SUMMARY OF ARGUMENT.

Appellees' position is that no error was committed by the trial court; that the jury's verdict is amply supported by the great weight of the evidence; that the alleged errors complained of are highly technical, and if they may be considered as errors at all, they are harmless errors within the meaning of Rule 61, Federal Rules of Civil Procedure.

In our discussion of the four specifications of error, and the four points relied on by appellant (R. 268-9) we submit:

(1) That the trial court had the power to try the case with a jury, and that this authority is contained in both subdivisions (b) and (c) of Rule 39. That if the court did not summon the jury under subdivision (b) upon a reconsideration of appellees' motion of August 5, 1954, then it was done under subdivision (c) and the omission of the word "advisory", and the trial judge's apparent misconception of the circumstances permitting an advisory jury, are immaterial.

(2)(a) That there was no error in the only portion of Instruction No. 4 to which appellant took exception, for the reason that while the judge limited the period during which appellant could claim loss of profits in the event of a breach of the contract by appellees,

still since the jury's verdict shows that it did not actually award appellant anything for even this limited period, or if anything at all, only an insignificant amount, no harm was done, even if the instruction had been wrongful.

(b) That the portion of Instruction No. 4 complained of was correct; that the other portion of Instruction No. 4 assigned as error is not before this court because of the absence of any exception (R. 205).

(3) That the evidence of appellant's breach of the contract was so overwhelming, a judgment for appellees, based on the verdict of the jury was required, and that no judgment could have been entered for appellant in any event and especially in the absence of a motion for a directed verdict.

(4) That the order denying appellant's motion for a new trial or for judgment n. o. v. is not appealable and the appeal is taken from the judgment and therefore point No. 4 (R. 369) is superfluous.

(5) That it is apparent from the jury's verdict it did not intend to give either side anything. Therefore the jury, in order to accomplish this, could not possibly have rendered any other form of verdict except that submitted to it in the court's form of "Verdict Number One" (R. 35). However, even if it could be said that the jury actually decided for appellant, still, the undisputed evidence gave the jury the right and imposed on it the duty to take into consideration, in fixing the amount to be awarded,

the additional expense which appellant's dereliction had imposed on appellees, namely $600 a month for 2½ years and the cost of the additional Associated Press service (R. 119, 137).

(6) That if any of the alleged errors in appellant's assignments can be considered as errors, none of them affected the substantial rights of appellant, and they must be considered as "harmless" within the meaning of Rule 61.

That when the jury was ordered on April 11-12, 1955, while appellant urged that it would be prejudiced by not being able to have certain witnesses present in person, instead of introducing their testimony by deposition, it did not make any motion for a continuance.

That no motion was made by appellant for a directed verdict.

That no exception was taken to the second portion of Instruction No. 4, assigned as error (R. 205).

ARGUMENT.

1. WAS IT REVERSIBLE ERROR FOR THE COURT TO IMPANEL A JURY PURSUANT TO ITS ORDERS OF APRIL 11 AND 12?

Subdivisions (b) and (c) of Rule 39 of the Federal Rules of Civil Procedure read as follows:

> "(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made

of right, the court in its discretion upon motion may order a trial by a jury of any or all issues

"(c) Advisory Jury and Trial by Consent In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

The appellees made a motion for jury trial in August, 1954 (R. 24). This was denied by the court (R. 25) because of a practice in not exercising discretion to grant such motions, although Rule 38(b) vests that discretion in the court.

While the court may overrule or deny such a motion, there is nothing to prevent the court from reconsidering a motion of that nature and on reconsideration, granting it. It is true that appellees did not renew the motion at Ketchikan, or at any time or place, after it was denied by the court in 1954, but the appellees had not withdrawn the motion and as the late Judge Jennings frequently said: "The rules are made for the Court and not the Court for the rules." The court had a perfect right to reconsider that motion and to base the order for the jury trial thereon, and his reason for doing so, if that was in his mind, is made clear by his order of April 12 1955 (R. 25). An attack had been made upon the

judge by an attorney named Warren Taylor in the Legislature, and certain newspapers had criticized him for doing so, and included among them was the Ketchikan News. We should think that the court might have been commended for its action under the circumstances.

Now, if it may not be considered that the court did this and granted the jury trial upon a reconsideration of the motion made by appellees in August, 1954, still the court had the right of its own motion and its own initiative under Rule 39(c) to call an advisory jury to try any issue in the case. It is true the court did not call this an advisory jury and seemed to be of the opinion that the advisory jury was called only in equity cases, although the rule provides for the trial of "any issue" with an advisory jury.

Surely, the court had the right under either subdivisions (b) or (c) of Rule 39 to submit the case to a jury, and this is particularly so when we consider the provisions of Rule No. 38(a) which provides that the right of trial by jury shall be preserved inviolate.

We find the following in *Barron and Holtzoff,* Federal Practice and Procedure, Vol. 2, p. 598:

> "There are District Court cases arguing that the trial court has no discretion to grant a jury trial on motion after time for demand has gone by unless there are special circumstances excusing the oversight or default.
>
> "But these decisions place the emphasis in the wrong place. Technical insistence upon imposing a penalty for default by denying a jury trial is

> not in the spirit of the rules. If the issue is one which normally should be tried by a jury, there is nothing in the rules to limit the court's discretion in enlisting the aid of a jury. This is made clear by the cases in which the courts have exercised discretion in granting motions for jury trials where the default has been the result of a misunderstanding or an honest mistake or a bona fide but ineffectual attempt to conform with the rules or unfamiliarity with the rules, or if there is doubt whether a pleading allegedly served by mail was actually received so as to start the limitation running on the time for a demand."

Surely there would be included in these reasons the one given by the court in this case, for changing its mind under the attendant circumstances and either granting the motion made by appellees in August, 1954, or in calling an advisory jury on the single issue involved in this case, which was the issue of damages for alleged breach of contract. This was properly a jury case and the issue was one of fact and a proper one for a jury and a general verdict was in order and was rendered. The court adopted this verdict and entered judgment thereon, and there was no necessity for findings.

In *Supplies Incorporated v. Aetna Casualty and Surety Co.,* 18 Fed. Rules Dec. Vol. 18, p. 226, the District Court for the Western District of Pennsylvania, said in an opinion dated Oct. 26, 1955:

> "If the issue is one which normally should be tried by a jury, there is nothing in the Rules to limit the court's discretion in enlisting the aid of

a jury. See 2, Barron and Holtzoff, Federal Practice and Procedure, Sec. 892''

Appellant says it was taken by surprise by this order for the jury and it was prejudiced because having considered that the case would be tried by the court, certain depositions had been taken of witnesses in New York and San Francisco; that if appellant had known the case was to be tried by a jury, it would have had those witnesses present in person, and it was therefore prejudiced in being obliged to read the depositions to the jury instead of being able to bring the witnesses from New York and San Francisco so they could have been examined orally.

There is no rule of law which makes any distinction between oral testimony given by a witness in court, and that given by deposition. The only difference is that while both forms of testimony are oral, that given by deposition is reduced to writing and read to the jury.

> ''While testimony given orally in court, may, in particular instances carry more weight, or be more convincing than other testimony given by deposition in the same case, it may in other instances be less convincing.''
>
> *Am. Jur.* Vol. 16, p. 746, sec. 112;
>
> *Belser v. American Trust Co.,* 125 Cal. App. 344 at 350.

The record discloses that all the depositions taken by appellant were taken on oral interrogatories submitted in New York and San Francisco. There was

no representative or counsel present on behalf of de
fendants and there was no cross-examination. Thes
depositions should have been to the advantage of ap
pellant and not to its prejudice, for if the witnesse
had been present in court counsel for defendant
would have had an opportunity to cross-examine then
fully. In a deposition where the witness has notic
as in this case, the answers to the interrogatories ca
be prepared in advance. If the witness is on th
stand, he is much more vulnerable. The appellees als
had assumed that the case would be tried without
jury; and on April 13, 1955, they were in the sam
situation in this regard as the appellant.

A complete answer, however, to the claim of preju
dice on the part of appellant, is that appellant did no
ask for a postponement of the trial. The trial wa
in April, 1955, and the next regular term of cour
at Ketchikan would have been October, 1955. It doe
not appear that appellant should be able to clain
prejudice where it did not take any steps for a post
ponement. The case of *Sather v. Lindahl*, 261 Pac. 2
682, was a case where the plaintiffs produced fou
witnesses in a personal injury case, after having de
nied in a deposition any knowledge of any witnesse
to the accident. Defendant made no objection to th
testimony of these witnesses, cross-examined them, an
asked for no relief from the surprise until after th
jury had been instructed. After a verdict for plain
tiff, the trial court on motion of defendant grante
a new trial. The Supreme Court of Washington re
versed because defendant had not either objected to th

testimony of the four witnesses or asked for a continuance.

If the action of the trial judge in this case in ordering a jury trial on April 11, 1955, was based on a reconsideration of defendants' motion of August 5, 1954, then the case is within the rule (see *Roth v. Hyer,* 142 Fed. 2d 227). If plaintiff were surprised by that ruling and prejudiced as it claimed, it cannot complain now, for it made no request for postponement of the trial.

> "The right to a jury trial, of course, is fundamental and the courts should indulge every reasonable presumption against waiver of such right."
>
> *Container Co. v. Carpenter Container Corp. et al.,* 9 *Fed. Rules Decisions* 261 (Dist. Ct. Del.)
>
> Citing
>
> *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393.

In the case of *Consolidated Fisheries Co. v. Fairbanks Morse & Co.,* 9 F.R.D. p. 539, the District Court for the Eastern District of Pennsylvania ordered a jury trial of all the issues in the case, where plaintiff was entitled as a matter of right under the rules to a jury trial of only part of the issues.

It must be remembered that the issues in this case were wholly issues of fact and the only matter submitted to the court and jury were questions of damages.

If the jury impaneled in this case was actually an advisory jury within the language of the rule, and if

no representative or counsel present on behalf of defendants and there was no cross-examination. These depositions should have been to the advantage of appellant and not to its prejudice, for if the witnesses had been present in court counsel for defendants would have had an opportunity to cross-examine them fully. In a deposition where the witness has notice as in this case, the answers to the interrogatories can be prepared in advance. If the witness is on the stand, he is much more vulnerable. The appellees also had assumed that the case would be tried without a jury; and on April 13, 1955, they were in the same situation in this regard as the appellant.

A complete answer, however, to the claim of prejudice on the part of appellant, is that appellant did not ask for a postponement of the trial. The trial was in April, 1955, and the next regular term of court at Ketchikan would have been October, 1955. It does not appear that appellant should be able to claim prejudice where it did not take any steps for a postponement. The case of *Sather v. Lindahl,* 261 Pac. 2d 682, was a case where the plaintiffs produced four witnesses in a personal injury case, after having denied in a deposition any knowledge of any witnesses to the accident. Defendant made no objection to the testimony of these witnesses, cross-examined them, and asked for no relief from the surprise until after the jury had been instructed. After a verdict for plaintiff, the trial court on motion of defendant granted a new trial. The Supreme Court of Washington reversed because defendant had not either objected to the

testimony of the four witnesses or asked for a continuance.

If the action of the trial judge in this case in ordering a jury trial on April 11, 1955, was based on a reconsideration of defendants' motion of August 5, 1954, then the case is within the rule (see *Roth v. Hyer,* 142 Fed. 2d 227). If plaintiff were surprised by that ruling and prejudiced as it claimed, it cannot complain now, for it made no request for postponement of the trial.

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It must be remembered that the issues in this case were wholly issues of fact and the only matter submitted to the court and jury were questions of damages.

If the jury impaneled in this case was actually an advisory jury within the language of the rule, and if

the question and the issue was solely one of damages and the court accepted the verdict of the jury and based its judgment thereon, there would be no necessity for findings.

In the case of *Reliance Life Insurance Co. v. Everglades Discount Co.,* 204 Fed. 2d 937, at page 942, the United States Court of Appeals (5th Cir.) said:

> "There is no objection to the trial judge impaneling an advisory jury and adopting its findings of fact, even in an equity case."
>
> *Civil Rule* 39(c);
>
> *In re Pan American Life Ins. Co.,* 188 Fed. 2d 833 (5th Cir. 1951);
>
> *Hargrove v. American Cent. Ins. Co.,* 155 Fed. 2d 225 (10th Cir.);
>
> *Burkhard v. Burkhard,* 175 Fed. 2d 593 (10th Cir.);
>
> *Dickinson v. General Acc. F. & L. Ins. Co.,* 147 Fed. 2d 396 (9th Cir.).

In the last mentioned case, 147 Fed. 2d 396, the trial court had treated the jury's verdict as advisory, rejected it and made findings contrary to the verdict. This court reversed and held that to be error because the issues were factual.

In Volume 5, *Moore's Federal Practice,* page 720, 2d Edition, the subject of an advisory jury under Rule 39(c) is discussed and referring to the necessity of findings under Rule 52(a), Moore says:

> "While the trial court's duty to make findings should be strictly followed, where the record was so clear that the Appellate Court did not need the

aid of findings, it did not remand but affirmed the district court's judgment that had been entered in accordance with the advisory verdict" (page 726, Sec. 39.10(4)).

On page 722, Sec. 39.10(1), in referring to the case of *American Lumbermen's Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.,* 108 Fed. 2d 497, we find the following:

> "We are inclined to agree with Judge Clark's approach. If there is any merit for the trial court's use of a jury in an advisory capacity for the trial of equitable issues, or legal issues upon which there is no right of jury trial (as in actions against the United States under the Tucker and Tort Claims Act) there must be similar merit in using the advisory jury for the trial of legal issues, where there was a constitutional or statutory right but the parties have waived it. In fact it is on the last type of issue rather than on the equitable issue that a jury is most likely to be helpful."

Then referring to Judge Murrah's counter argument in the case of *Hargrove v. American Cent. Ins. Co.,* 125 Fed. 2d 225, Moore goes on to say:

> "If the parties want a court trial, the court should not be able to impose a jury trial upon them. He is undoubtedly right that the court cannot on its own initiative impose a common law jury trial upon them. But the court is not doing this when it utilizes a jury in an advisory capacity. In effect the trial is a court trial, for the jury acts merely as an aid to the judge, since he must make his own findings of fact and conclusions of law

and must bear the ultimate responsibility for the judgment. This is why Judge Clark and Judge Murrah both come out at the same result—no reversible error in utilizing an advisory jury, although they differ in principle as to situations where the advisory jury may be used.

"Rule 39(c) is clear that it is within the district judge's discretion as to whether or not he will use an advisory jury, and he may act either *on his own* initiative, or on motion of a party."

"If the lower court treats the verdict as advisory and concurs therein, on appeal, if there was any error in treating the jury's verdict as advisory and concurring therein, such error would be harmless."

Pennsylvania Threshermen and Farmer's Mutual Casualty Ins. Co. v. Crapet, 199 Fed. 2d 850 (5th Cir.).

We submit that the trial court had the power to reconsider defendants' motion for a jury trial made on August 5, 1954, and in September, 1954, denied. That being so, the jury was impaneled and the case tried just as though the jury had been requested by either party within the time prescribed by the rule. If, on the other hand, the court called an advisory jury, this was clearly within the provisions of Rule 39(c), and since the jury decided the only issue there was in the case and the court adopted the jury's verdict and entered judgment thereon, findings would have been superfluous.

"The inherent powers of a court are such as result from the very nature of its organization and are

> essential to its existence and protection and to due administration of justice. It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Such power has been exercised over the court's process to prevent abuses; to relieve a party in default; to grant bail, etc."
>
> 14 *Am. Jur.* page 370, Sec. 171.

> "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process."
>
> *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.,* 239 U.S. 134, 145.

It is well established that a court, at any time in the proceedings of a case before it, may reverse a former ruling, especially where it does not affect property rights and where the result of the reversal does not substantially affect the rights of the parties. If appellant in this case foresaw any prejudice to its rights, the remedy was by motion for continuance, which was not made.

The principle of law above mentioned is greatly strengthened by Rule 61 relating to harmless error, which we shall discuss later in this brief. The trial was set for Wednesday, April 13. A continuance until Monday, April 18th would have given the witnesses ample time to have come from New York and San Francisco by airplane. But the presence of the

witnesses would have been a distinct advantage to appellees, for we could have then cross-examined them in court. We did not do that in the taking of the depositions.

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2. WAS THERE ANY ERROR IN THAT PORTION OF INSTRUCTION NO. 4 OBJECTED TO BY APPELLANT?

Appellant assigns as error the giving of two portions of Instruction No. 4 (R. 30, 31). These two portions are

(a) That portion which instructs the jury that the original contract would have expired on September 27, 1957, instead of September 27, 1962, as claimed by plaintiff; and

(b) That portion which reads as follows:

> "In determining the amount of damages, if you find that plaintiff is entitled thereto, you may consider . . . the probability of change during the period referred to in the rates, the cost of doing business, and the margin of profit, as well as the probability or improbability that defendants would remain in business."

Counsel for appellant at the conclusion of the instructions of the court took exception to the first part of Instruction No. 4 complained of, but no exception was taken to the other part of the instruction, designated herein as "(b)" (R. 205). The record shows at pages 204 and 205 that counsel for appellant took but one exception, as follows:

> "Mr. Dimond. I just want to take exception to part of Instruction 4 which instructs the jury to

> the effect that the term of the contract would expire September 27, 1957, rather than September 27, 1962."

Having taken no exception to the latter part of Instruction No. 4, appellant is not in a position to raise the question here.

With reference to (a) hereinabove, we submit that there was no error in the trial court's interpretation of the original contract and the modification thereof of February 21, 1950. We must bear in mind that both the contract and the modification were prepared by appellant, and under such circumstances the rule is well settled that if there is any ambiguity in such a contract, all doubts must be resolved against the party writing the contract. The "Modification of Agreement" dated at New York February 21, 1950, reduces the rate which was then being paid by the appellees for its news services from $72.52 per week to $52.52 per week. Paragraph 7 of that modification reads as follows:

> "The term of the agreement between the parties shall be extended by the length of time during which the above suspension is in effect."

The agreement mentioned is, of course, the original agreement between the parties. According to the terms of that agreement which went into effect October 3, 1945 (R. 11) the next expiration date after February 19, 1950, would have been October 3, 1953, but when October 3, 1953, arrived, there was already added to the expiration date the period from February 19, 1950, to October 3, 1953, or three years and eight months.

Before the original contract was terminated, the modification of February 19, 1950, had been in effect approximately four years. Therefore, we would add four years to the date of October 3, 1953, and that would make it October 3, 1957. It will be observed that the original agreement is rather confusing as to dates and in paragraph 8 thereof (R. 10) it is stated that it begins on September 1, 1945, and extends for three years with automatic renewals for periods of five years thereafter (R. 10). But in paragraph 12 (R. 11) this date is contingent on the commencement of daily publications by the appellees, and at the bottom of the 13th paragraph (R. 11), we find the following:

"Actually started Svce. 10/3/45".

Counsel's argument is that the four years during which the modification had been in effect between February 19, 1950, and the date of the termination of the original contract should be added to the expiration date of October 3, 1953, and that five years more should be added to that. But we think it is plain from a reading of the modification that if appellant had lived up to this part of the contract, the appellees instead of being able to give notice of termination on October 3, 1953, would have been compelled to wait after October 3, 1953, the number of years the modification remained in effect. That would have been October 3, 1957, so that under any circumstances appellees could have terminated the contract according to its terms and without any default or breach on the part of either party on October 3, 1957, by giving six months' notice prior to that date.

There is another reason why the position of appellant in this regard is untenable, and that is that since the verdict and judgment resulted in nothing for the appellant, it could not very well have been prejudiced by this part of Instruction No. 4. If the jury had given the appellant a verdict for its claimed loss of profits until October 3, 1957, and had been prevented from giving more or going beyond October 3, 1957, by the court's instructions, there might be some merit in the argument of appellant, but since appellant got nothing except a forgiveness of its admitted indebtedness to appellees of $368.70, the court's instruction in this regard could be nothing more at most than harmless error, which will be discussed hereinafter. However, we do not think it was even harmless error or any error for the court to so instruct the jury.

The general rule of law is found in 39 *Am. Jur.* 128, Sec. 118, where it is stated:

> "Ordinarily a trial court will not grant a new trial on account of error in giving instructions unless it is probable that the result of the trial was changed thereby. Accordingly an erroneous instruction is held not to be ground for a new trial if it is manifest that the complaining party was not in any way prejudiced thereby, or if the court can see from the whole record that even under correct instructions, a different verdict could have been rightfully rendered."

(b) Referring to the error claimed in the giving of the second part of the court's instruction, namely, that part which instructs the jury that they may take into consideration "the probability of change during

the period referred to in the rates, the cost of doing business, and the margin of profit, as well as the probability or improbability that defendants would remain in business", we think the record abundantly shows that appellant claimed its margin of profit fluctuated The testimony of Mr. Belnap, a witness for the defendant (R. 67, 68) shows that in December, 1953 which was less than two months before the termination of the contract, the total revenue from the appellant's business in Alaska was almost $2.00 less than its expenses per week. Taking the record as a whole we find that appellants were for many years furnishing the appellees with inadequate service and not living up to the terms of the contract. We shall discuss this more in detail hereinafter. The rival newspaper was getting news every day and news of great importance which appellant was not furnishing to appellees under its contract, and the court undoubtedly had that in mind for in another part of Instruction No. 4 (R 31) it is said:

> "The defendants contend that news of local importance was frequently omitted from that transmitted to them which prejudiced them in the operation of their newspaper business and in competing with the rival newspaper."

Therefore, when the court gave the last part of Instruction No. 4 complained of, the judge undoubtedly had in mind the possibility of the appellees being forced out of business through the failure neglect or refusal of the appellant to live up to the terms of the contract and furnish the appellees with

sufficient news service to permit it to compete with its rival newspaper.

It is well settled, however, that where no exception is taken to an instruction, no error can be assigned to the Appellate Court thereon.

Another reason why, even if this portion of the instruction had been erroneous, it is not grounds for a new trial or for a reversal of the judgment, is because the appellees *had* remained in business from the date of the termination of the contract in February, 1954, until April, 1955, a period of fourteen months, and before any advantage could be taken of this, even if it were error, it could hardly be claimed unless the jury had first given the appellant a verdict for its claimed loss of profits from February 14, 1954, until April 13, 1955, at least. This, under plaintiff's claim of a total of over $21,000.00, would have been roughly something over $2,000.00. If the jury had given appellant that much and had been prevented by the instruction from assuming that appellees would remain in business any longer than the date of the termination of the trial, there might be some merit in the argument.

> "Error in adverse ruling without adverse effect may subject judge to criticism but not the case to retrial."
>
> *United States v. Parcel of Land, etc.,* 47 Fed. Supp. 30.

3. DID THE COURT ERR IN ENTERING JUDGMENT FOR A PELLEES AND IN REFUSING TO MAKE FINDINGS AN ENTER JUDGMENT FOR APPELLANT FOR A SUBSTANTIA AMOUNT?

(a) In support of this assignment of error appe lant in its brief alleges that appellees offered no sul stantial evidence to controvert that of appellant wit reference to the claimed loss of prospective profit We do not agree, when we consider the testimony c Mr. Belnap (R. 68) that just six weeks before th termination of the contract appellant was losing on it Alaska business approximately $2.00 a week.

Assuming, however, for the sake of argument tha this made no difference, no judgment could have bee entered for appellant in this case if it breached th contract itself, and we submit that the evidence i overwhelming that it was the appellant which breache the contract and not the appellees.

The evidence on this point was so voluminous, cor sisting in large part of scores of newspaper clipping showing important news to have been available an which should have been furnished appellees unde its contract, but which was not furnished; that it wa not practical to print all these exhibits in the record The original records, however, are before the cour

We call the court's attention to some portions o this evidence which we think was not controverted:

See testimony of Paul S. Charles, R. 111-120;

Testimony of Gene Brice, R. 149, 151-165;

Testimony of Marie J. Flood, R. 127-146, inclusive

Letter from Harry Carlson, appellant's manager in Seattle, to the Chicago and Portland offices of appellant, dated March 2, 1948 (Defendants' Exhibit G, R. 131-133), apologizing for poor service; in this letter Mr. Carlson admits that the appellant was not furnishing proper service, and he refers to the editor of the appellees' paper, Mr. Sid D. Charles, as having "the patience of Job", and that he is "justified in registering a vigorous complaint". Mr. Carlson then goes on to discuss failure to send very important news to the appellees;

Letter dated January 29, 1949, from the appellee to Mr. Molander, manager of the appellant in New York, registering complaints about poor service and listing many instances and stating that "Time after time we have been scooped on important Alaska news from Washington" (R. 133, 134);

Letter from Daily News to the appellant in New York (Attention Mr. Molander), dated December 27, 1949 (R. 136). In this letter the appellees complain that the cost of the news to the appellees is twice the amount paid by the rival newspaper to the Associated Press, and that the rival newspaper is getting twice the wordage for half the cost;

Letter dated January 14, 1954, from Mrs. Flood of the appellee's staff to Mr. Belnap, in which complaint is made of the ever increasing costs. That letter contains the following statement:

> "We have been constantly scooped on stories that are of interest to our area by the Chronicle that

carries Associated Press. In the past we ha made our own arrangements with Bob De A mond, who acted as your stringer to get covera on the last legislature'' (R. 141, 142).

Letter from the appellees to Harry Carlson dat April 16, 1948 (Plaintiff's Exhibit 9, R. 261-26 complaining of lack of accurate news in connecti with the Seattle earthquake;

Letter from Mrs. Flood to the appellant in N York dated November 14, 1953, with reference to ca cellation of contract and complaining of the ne coverage (Defendants' Exhibit G; R. 266).

Then throughout the record there are several lett from the appellant to the appellees promising bet service and acknowledging the defects. Among th is the letter from Mr. Bowerman to Mr. Charles the appellees' staff dated February 5, 1949 (Pla tiff's Exhibit 5, R. 246). Mr. Bowerman acknowledg the complaint on the coverage and concludes his let by stating as follows:

> ''Editorially my impression was that we w miles ahead of A. P. as a general rule, and I a glad to have it pointed out that there are defe in the coverage. We are going to work to reme this at once and you will be hearing direct fr Mr. Harry Carlson at Seattle thereon.''

It will be observed that in each of the letters fr the appellees to the appellant during the years prec ing the termination of the contract the complai consisted of both objections to the constant increas in cost along with poorer and poorer service on t

part of appellant. Many complaints were made by telegram (R. 111, 146). The letters from Mr. Sid Charles, editor of the appellees' paper, show that he was willing and anxious to cooperate with the appellant, and he was very patient with its shortcomings. Even Mr. Carlson acknowledged that in his letter in which he said that Sid Charles "had the patience of Job".

The record and exhibits show that frequently Mr. Charles would query the United Press and ask them to be sure to send items regarding very important news to the people of Alaska which was coming out of Washington, and even after the query while the rival paper got the news through the Associated Press, the appellees would not receive it through the appellant (R. 146).

An instance of the poor service furnished by appellant was in connection with news originating in Juneau and of paramount importance to all the people of the territory, as Juneau is the capital of Alaska and the headquarters for the federal and territorial officials.

In Plaintiff's Exhibit 9 (R. 249) there is a letter dated October 14, 1946, from Mr. Charles to the United Press Association with reference to this news service from Juneau. Mr. Charles said in that letter it had been his understanding that the correspondent there would send the news to him direct without need of clearing it through the Seattle office, but that the appellees had not received a thing from Juneau for a long time. This is only a small portion of the evidence

with reference to the breach of contract on the pa
of appellant, and in the portion to which we have r
ferred hereinabove it was shown that appellant h
not furnished the appellees with news of great impo
tance to all the people of the territory, and partic
larly to the people of Ketchikan, although it was
carried in the rival newspaper, the Chronicle. Su
things as the records of deaths in the Seattle eart
quake, a resolution passed by the Western Governo
Conference at Sacramento urging statehood f
Alaska, news regarding the settlement of Indian a
cestral claims to a large portion of the territory, a
news of particular importance to the people of Ketc
kan with reference to timber sales and the comi
of a large pulp mill to the Ketchikan area, whi
proved to be by far the most important developme
ever undertaken in the territory, were not furnish
by appellant to appellees (R. 111-115 and Defendan
Exhibit H, not printed).

The Defendants' Exhibit H which is not print
contains several score of newspapers and newspap
clippings showing articles of considerable importan
emanating from Juneau sent by the United Pre
representative in Juneau, Mr. George Sundborg,
the rival paper, the Chronicle, which were not receiv
by the appellees either direct from Mr. Sundbo
United Press Correspondent in Juneau, or from t
United Press itself under the terms of the contra

It may be pointed out that in the testimony of M
Brice, who compared the two newspapers publish
in Ketchikan, he admitted that while he had list

perhaps 200 items, there were probably three or four on which some service was made by the appellant to the appellees but in comparing the great number of papers which Mr. Brice was called upon to compare, it is not surprising that of about 200 he omitted only three or four; but it is significant that the appellant before the trial had submitted to the appellees certain interrogatories asking for specific instances where the appellant had failed to furnish an adequate news service. These interrogatories were answered months before the trial and they consisted of 69 separate paragraphs giving specific dates and items of news omitted from the service furnished by the appellant, and yet with this information before them, appellant could find only four mistakes. When it came to the trial, of course, Mr. Brice was able to add many other instances to the 69 paragraphs which had been already furnished the appellant (R. 170).

An examination of Defendants' Exhibit H shows as many as four or five items in one day furnished the Chronicle, the rival newspaper in Ketchikan, by the appellant's own correspondent in Juneau, none of which were furnished the appellees.

(b) Perhaps what we have said in subheading (a) is superfluous, for we do not think that this matter is before this court at all, for the reason that appellant made no motion for an instructed verdict, and that is a prerequisite to raising the question on appeal.

The rule as we find it in *Een v. Consolidated Freightways,* 220 Fed. 2d 82 (8th Cir.), would seem to be as follows:

"1. On appeal from judgment on verdict, dence must be viewed in light most favorabl prevailing party; . . .

"2. Whether the evidence is sufficient to sus a jury verdict cannot be considered by the ap late court where the appellant did not reque directed verdict in the trial court.

"3. Where the whole record of the trial ab dantly sustains a judgment, even if error has committed in the introduction of testimony, error is considered harmless within the mean of Rule 61, F.R.C.P."

"An appellant can not on motion for new t or on appeal, raise the question of the insufficie of the evidence unless he has first moved fo directed verdict at the conclusion of all of evidence."

Boudreau v. Mississippi Shipping Co., 222 I 2d 954 (5th Cir. 1955);

Moore v. Louisville & N. R. R. Co., 223 Fed 214 (5th Cir. June, 1955);

O'Malley v. Cover, 221 Fed. 2d 156 (8th 1955).

Appellant discusses this assignment in relation the amount of damages which the appellant clain but before any damages could be awarded to appell it would have been necessary to first determine appellees had breached the contract. This quest of course, is a part of the consideration of the d ages, but even this question of whether or not the pellees breached the contract cannot be raised her the absence of a motion for instructed verdict. T

is the heart of the case, for if the appellants themselves breached the contract, there could be no damages, and the verdict of the jury was proper; but in any event, the question cannot be raised on appeal, because there was no motion for instructed verdict.

---

4. CAN THE ACTION OF THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BE REVIEWED IN THE APPELLATE COURT?

The appeal in this case is taken from the final judgment (R. 41). It would seem, therefore, that the fourth specification of error is superfluous. If it is not, then we suggest that this court has many times held that an order denying a motion for a new trial is not appealable.

Libby, McNeill & Libby v. Alaska Industrial Board, 215 Fed. 2d 781 (9th Cir. 1954), and cases cited therein.

---

5. VERDICT.

The appellant insists that the verdict (R. 35) was for the appellant, and that being so, the amount under the evidence should have been much greater than the amount awarded it.

This verdict at first glance may seem a little confusing and illogical, but not so when we consider all the evidence.

The jury was handed two forms of verdict by the court and the first form was for use in case the jury

found for the appellant in a sum greater than t
sum of $368.70, which was the appellees' countercla
admitted by appellant (R. 73-74). The second fo
was a verdict for appellees. The court did not expl
these forms to the jury, but said they were "se
explanatory" (Inst. No. 11, R. 34).

Apparently the jury considered only the form
Verdict No. 1. They were bound under this form
deduct $378.70 from any amount to be inserted
line 3 of the verdict in the blank space which v
provided (R. 35). Since they could not deduct $368
from anything less than $368.70, they filled in t
same thing on line 3. We must remember that wh
this form of verdict was handed the jury the amou
to be filled in on line 3 (R. 35) had been left bla

The appellees' counterclaim was for some payme
made by the appellees after the contract was ter
nated. The jury may well have felt, for some reas
that these payments should have been paid by the a
pellees. We are not permitted to speculate on th
reason, but their verdict simply cancelled out all clai
of one side against the other.

The Federal Rules require, we think, that we mu
look through the form to the substance in such matte
and looking through the form and considering all t
circumstances, it is apparent that the jury intend
by its verdict to award nothing to either side.

The trial court took this view, for we find the follo
ing in the court's order denying costs to either pa
(R. 215):

> "It is obvious that what the jury wanted to do is not allow either party anything, and it seems to me we have got to disregard the form of their verdict and view it merely as a device to award nothing to either party, and viewing it that way, then who is the prevailing party? * * * Well, I am inclined to think that each party should pay its own costs. I have felt that way from the time that the verdict was returned and noting that it was merely a device to avoid awarding anything to either party, so it will be the order of the Court that each party will pay its own costs."

It will be, I think, technical to say that appellant was the prevailing party. Even if the jury could have possibly found for appellant, in the face of the overwhelming evidence of the breach of the contract by appellant, and had found that the appellees had breached the contract, still it had the right and duty to assess appellant's damages in whatever sum appeared right to the jury; but it must be apparent, as Judge Folta said, that the verdict meant that neither side should recover. This is apparent, if we consider the two forms of verdict as submitted, bearing in mind that there was a blank space on line 3 of Verdict No. 1 for the insertion of the amount.

If the jury had decided that neither side should recover, as it seems certain they did, then there was no other form of verdict they could return; that is to say, there was no other way in which they could have returned one of the verdicts submitted, and they returned the only form by which they could accomplish the result.

If they had signed the first verdict without ins
ing anything in the blank space, then appellees wo
have prevailed. If they had signed the second fo
of verdict which had the figure of $368.70 inserte
represent appellee's claim, appellee would have p
vailed. If they had inserted more than $368.70
Form No. 1, then appellant would have prevai
They could have done nothing other than they
in order to accomplish their purpose, which obviou
was to find no damages for either side.

The case of *Smith v. Philadelphia Transport*
173 Fed. 2d 721, was before the United States Co
of Appeals, for the 3rd Circuit. In that case
interrogatories or special verdicts had been submi
to the jury and they came in with their answers
awarded the plaintiff in the case $500.00 on one cl
and $10,000 on another claim in which only $527
had been demanded. The court held that it was
parent the jury had made a mistake and it orde
the answers to the special questions to be transpo
and be set opposite the proper questions. The co
held that the mistake in the verdict of the jury or
answers to the special questions constituted harm
error.

In this case the record abundantly shows that if
jury had undertaken to write its own verdict, it wo
have brought in a verdict stating simply that it fo
for neither side, but of course, it felt bound to fol
one of the forms submitted by the trial court.

Even if it could be said, as contended by appell
that in finding $368.70 for appellant the jury n

have found that the appellees had breached the contract, still the jury had a wide latitude in the amount of damages it would award the appellant.

Conceding for the sake of argument only, that the jury did find a breach by appellees, they must have also found that appellant was entitled to little more than nominal damages. They could well do this under the evidence. Appellant had not been furnishing the news service as agreed, although they furnished some. Appellees had been obliged to supplement this news service at a cost of $600 a month for 2½ years (R. 119). They eventually had to take the Associated Press service also in order to get the news (R. 118). This cost approximately half as much as appellant's service (R. 137). This testimony is undisputed, and the jury may have very well considered that even if appellees had breached the contract, the damage to appellant was very slight.

In the case of *United Press Associations v. Natl. Newspaper Assn.,* 254 Fed. 284 cited in appellant's brief there appears to have been no such uncontroverted evidence of facts which could have impelled the jury to reduce the verdict to $500.00.

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6. HARMLESS ERROR.

Aside from the arguments we have made in answer to appellant's specifications of error and the comments we have made on the verdict, it would appear that since no substantial rights of the appellant were affected by the verdict even if the trial court had erred

in calling the jury and in giving those portions Instruction No. 4 complained of, and in basing judgment on the verdict, it was harmless error wit the meaning of Rule 61, Federal Rules of Civil P cedure, which reads:

> "Rule 61. *Harmless error.* No error in either admission or the exclusion of evidence and error or defect in any ruling or order or in a thing done or omitted by the court or by any the parties is ground for granting a new trial for setting aside a verdict or for vacating, modi ing, or otherwise disturbing a judgment or or unless refusal to take such action appears to court inconsistent with substantial justice. T court at every stage of the proceeding must d regard any error or defect in the proceeding wh does not affect the substantial rights of parties."

Looking at the record as a whole, it is clear t whether the case was tried by the court or whet it should be tried again with the changes in the structions and rulings of the court and the forms verdict submitted to the jury, the result would the same.

> "If there is no likelihood that a retrial wo result in a different verdict, a new trial will refused."
>
> *Bruner v. Knickerbocker,* 4 Alaska 387.

This court applied the rule regarding harmless er in the case of *Rudeen v. Lilly,* 199 Fed. 2d 300, at 3

In the case of *Daniels v. Goldberg,* 173 Fed. 2d 9 the jury in the trial court had requested that the te

mony of a certain witness, Dr. Klein, be read to them after they had retired. They then found a verdict for plaintiff. It was discovered afterward that the reporter in reading the testimony had inadvertently omitted a portion. This was one of the grounds urged in the United States Court of Appeals for the Second Circuit for reversal. The court disposed of the matter in language as follows:

> "That part of Dr. Klein's testimony which by inadvertence was not read to the jury contained nothing of significance which would have affected the jury's verdict."

The court had a right to reconsider appellees' motion for a jury and to grant it if he saw fit. He also had the right to call an advisory jury, and although he did not consider this an advisory jury, still that would make no difference. He certainly had a right to call a jury on one ground or the other, and the fact that this might have been an advisory jury within the meaning of the rule and the judge had omitted the word "advisory" or thought it did not apply, would seem to make no difference under Rule 61, and it would be not only harmless error but highly technical.

In the case of *World Fire & Marine Insurance Co. v. Palmer,* 182 Fed. 2d 707, at 712, the Court of Appeals for the Fifth Circuit had been asked to reverse a judgment of the District Court in favor of plaintiffs. The Court of Appeals said:

> "Even though we do not approve of the reasoning of the trial judge, he reached the right result and consequently no error appears."

See, also:

Miller v. Mutual Life Ins. Co., 17 Fed. R
Dec. 121.

The Federal Rules are designed to eliminate tec
calities, simplify procedure, and do away with un
essary appeals, and there are many things which v
formerly held to be grounds for a new trial which
not now.

In the case of *Alaska Fishermen's Packing Co
Chin Quong,* 202 Fed. 707, at 713, this court
where the defendant had set up a counterclaim
plaintiff's demands, it was not material that the t
court may have excluded evidence on the meas
of damages alleged by defendant, where the jury
awarded defendant nothing but had brought in a
dict for plaintiff. This court said (page 714):

> "The whole contention becomes immaterial
> view of the fact that the jury found no dam
> for defendant. The error, if error there was,
> thereby made immaterial." (Citing *Cunningi
> v. Springer,* 204 U.S. 647.)

These cases were decided before Rule 61
adopted, and there is much more reason for the ap
cation of the doctrine of harmless error under
rule than there was before it was made applicabl

In the case of *McCandless v. United States,* 74 1
2d 596 (9th Cir.), this court held that the court be
committed error in denying certain offers of p
submitted by defendant, but that the denial was
prejudicial.

Citing

Simpson v. U. S., 289 Fed. 188;

Armstrong v. U. S., 16 Fed. 2d 62, 65,

also decided by this court.

Again this court said in another Alaska case, *Hoogendorn v. Daniel,* 202 Fed. 431, at page 433:

> "Unless it can be shown that prejudice has resulted from error of the trial court, prejudice will not be presumed."

In the case of *Smith v. United States,* 63 Fed. 2d 252, the Court of Appeals for the Seventh Circuit held:

> "Appellant must show evidence at the trial was so overwhelming in his favor that a contrary finding should not be allowed to stand."

Rule 61 was applied by the Eighth Circuit in *Walsh v. Bekins Van Line Co.,* 217 Fed. 2d 388 (1954), where the court held that

> "Unless an appellant can show from the entire record the denial of some substantial right there will be no reversal."

In the case of *Sneed v. United States,* 217 Fed. 2d 912, 914, the Court of Appeals for the Fourth Circuit concluded that certain testimony was incompetent, but harmless, in view of all the other evidence, and that Rule 61 applied.

See, also:

Psiriakis v. Psiriakis, 221 Fed. 2d 418 (3rd Cir. 1955).

CONCLUSION.

We submit that the great weight of the evide in this case shows that the appellees were enti to prevail and that the appellant had breached contract. The judgment should be affirmed for reasons hereinabove discussed, namely, that the c properly submitted the case to a jury either ur Rule 39(b) or 39(c); that the instructions were rect; that the verdict was more than amply sustai by the evidence; and that this verdict in ef awarded nothing to either side.

While the order for the jury might have b actually more specific and the court might have ca it "an advisory jury", and while the court might h made findings based on the verdict, all these mat would have been superfluous, and if any error ca charged in the proceedings, it was harmless e within the meaning of Rule 61, Federal Rules Civil Procedure; and in this connection, we wish repeat and emphasize the fact that when counsel appellant complained that he would be prejud by the calling of the jury, he should have asked a continuance of the trial. The decision of the c to call a jury on April 11, 1955, found appellee the same position as it found appellant, becaus that time the appellees had also prepared for a t before the court.

We also wish to repeat and emphasize the fact appellant cannot now complain of the verdict, a

made no motion at the conclusion of the trial for an instructed verdict in its favor.

The judgment should be affirmed.

Dated, Juneau, Alaska,
February 8, 1956.

Respectfully submitted,
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By H. L. FAULKNER,
Attorneys for Appellees.

No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS,
a corporation,
Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF FOR APPELLANT.

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FILED
MAR - 1 1950
PAUL P. O'BRIEN, CLERK

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REPLY BRIEF FOR APPELLANT.

PRELIMINARY CONSIDERATIONS.

Appellees, in their brief, have made certain statements and have advanced certain arguments which appellant believes should be answered. Hence, the purpose of this reply brief. The matters to which this brief will be directed are these:

1. The bold assertions that appellant, and not appellees, had breached the contract between the parties

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Volume 6, Section 59.08(5), page 3820.....

No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS,
a corporation,
Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF FOR APPELLANT.

PRELIMINARY CONSIDERATIONS.

Appellees, in their brief, have made certain statements and have advanced certain arguments which appellant believes should be answered. Hence, the purpose of this reply brief. The matters to which this brief will be directed are these:

1. The bold assertions that appellant, and not appellees, had breached the contract between the parties

and that appellees were thus justified in rescinding it; and either (a) that the verdict on the issue of liability ought to have been for appellees, rather than for appellant, or (b) that the real "intent" of the jury was to decide this issue in appellees' favor.

2. The contentions that the ordering of a jury trial by the district judge on the eve of the trial (R. 25) was not error because—

(a) It constituted a reconsideration of appellees' motion under Rule 39, F.R.C.P., denied some six months previously (R. 25);

(b) That appellant had waived its objection to any possible error of the trial court in calling a jury by failing to request a postponement of the trial; or

(c) That it could be considered that the jury was merely advisory and that the trial court had simply adopted the verdict as its own findings of fact.

3. The claim that appellant cannot now assert that certain of the trial court's instructions were erroneous because appellant failed to object to them at the trial of this action.

4. The contention that appellant has no right to assert that the jury's award of damages was inadequate, because appellant failed to request a directed verdict.

5. The assertion that if there were any error on the part of the District Court it was really only "harmless error" (F.R.C.P., Rule 61), and thus would not justify a reversal by this Court.

1. THE ISSUE OF LIABILITY.

Appellees devote a large portion of their brief in trying to establish that appellant had continually furnished a poor news service, despite many complaints by appellees, and that because of this the latter were justified in arbitrarily renouncing the contract before its date of expiration. But the issue of liability for breach of the contract is not one that should be considered here. The jury had definite instructions as to what facts would justify a finding in favor of appellees, for as part of its Instruction No. 4 the District Court said:

> "* * * On the other hand if you find from a preponderance of the evidence that the plaintiff failed to furnish the defendants with the news agreed upon, then you would be warranted in finding that the defendants were justified in rescinding the contract and your verdict should be for the defendants." (R. 31.)

If the jury, under these ample instructions, had thought that appellant had breached the contract by not furnishing the kind of news service agreed upon, then it certainly would have said so. There were two forms of verdict—one providing for a finding "for the plaintiff", and the other providing for a finding "for the defendants" (R. 35-36); and these forms were in no way uncertain, confusing or ambiguous. Had the jury agreed with appellees' contentions on the issue of liability Verdict Number Two (R. 36) would certainly have been returned.

What appellees are doing then is attacking the verdict of the jury, for otherwise there would be no point in devoting such a large part of their brief in attempting to prove that appellant, and not they, had breached the contract. But this cannot be done here, because appellees made no motion under Rule 59 FRCP to set aside the verdict as against the weight of the evidence, and hence they cannot assert any abuse of discretion in the trial court in refusing to grant such a motion. See Moore's Federal Practice, Vol. 6, Section 59.08(5), p. 3816; id., p. 3820. Furthermore, even if appellees had protected their position in this matter by filing a motion for a new trial, or by having requested a directed verdict under Rule 50 FRCP, they did not obtain the allowance of a cross-appeal and therefore cannot confer jurisdiction on this Court to consider the question. See *United States v. American Railway Express Company,* 265 U.S. 425, 435; *Morley Company v. Maryland Casualty Company,* 300 U.S. 185, 191.

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2. THE ORDERING OF A JURY TRIAL.

Appellant submits that in its opening brief (see Brief for Appellant, pp. 12-21) it presented a complete case for the proposition that the District Court erred in ordering a jury trial, after a waiver thereof by appellees, and that this error was prejudicial. The District Court's sudden and completely surprising change of position on the eve of the trial (R. 25)

cannot logically be construed as a "renewal" by appellees or a "reconsideration" by the Court of appellees' motion under Rule 39—a motion which had been denied six months previously (R. 25, 46-47). The record shows beyond dispute that appellees' counsel was not, on April 12, 1955, renewing his motion for a jury trial (R. 50), and that the Court was not acting upon any request or motion, but solely on its own initiative (R. 25, 50).

Appellees maintain that a complete answer to appellant's claim of prejudice in this respect is that appellant did not ask for a postponement of the trial—until October, 1955. (Appellees' Brief, p. 14.) But in addition to the noticeable absence of legal authority supporting this purely gratuitous suggestion, it could hardly be considered a solution for the unenviable predicament in which appellant found itself on the day before the trial. Appellant's counsel resides at Juneau, Alaska, and its witness, David Belnap, at Seattle, Washington (R. 52), and both had gone to the expense of traveling to Ketchikan *before* any notice was given that the trial court did not mean to adhere to its ruling of September 24, 1954 when the motion for a jury trial had been denied. If a request for postponement had been made, and granted, then there would simply have been a duplication of these not inconsiderable expenses—expenses that would not have been recoverable and which would have added further loss to the substantial losses that appellant had already suffered through

appellees' breach of contract. Appellant was simply in a helpless situation that was wholly uninviting no matter which way it turned.

Finally, it cannot be considered that the jury's verdict was simply "advisory" and that the District Court had therefore adopted such verdict as its own findings. (See Appellees' Brief, pp. 16-18.) Rule 39, F.R.C.P. makes it abundantly clear that an advisory jury may be utilized in actions "not triable of right by a jury" (Rule 39(c)), and not, as in this case, where a demand for a jury trial may have been made of right but the right had been waived. Despite Professor Moore's "preference" in this matter (Moore's Federal Practice, Vol. 5, pp. 720-722, Section 39.10(1)), the decision of the Tenth Circuit in *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229, is decisive of this issue; for there that Court said specifically that in circumstances such as we have here a Court is not authorized to call a jury, either on its own initiative or in an advisory capacity. And this was the precise viewpoint adopted by the District Court in this case, for after the trial was over the suggestion was made that perhaps the verdict could be considered as advisory, and that the Court could then disregard the verdict and enter its own independent findings of fact. But the District Court said on this:

> "* * * but the reason I think it would be futile to argue that the jury may be treated as advisory is because, if I am not mistaken, the law doesn't provide for an advisory jury except in actions

of an equitable nature. There is no authority whatever for empanelling an advisory jury except in an equity action."

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3. THE FAILURE TO OBJECT TO CERTAIN OF THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY.

It is true that appellant's counsel objected to only one part of the trial court's instructions to the jury (R. 204-205), and that through inadvertence failed to object to other portions of the instructions, the giving of which appellant now assigns as error. (R. 268-269; Appellant's Brief, pp. 38-41.) But appellant submits that the alleged erroneous instructions were on matters that were material, and that therefore the failure of counsel to either request specific instructions or to take exception to those made cannot be adequate to absolve the trial court from its failure to properly charge the jury on the essential issues of the case. *Dowell v. Jowers,* 166 F. 2d 214, 221, cert. denied, 334 U.S. 832; cf. *Hormel v. Helvering,* 312 U.S. 552, 557; Moore's Federal Practice, Vol. 6, pp. 3779-3780, Section 59.08(2).

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4. THE FAILURE TO REQUEST A DIRECTED VERDICT.

After appellees have devoted a large part of their brief to the question of which party breached the contract, they then say that appellant cannot raise this issue because it failed to move for a directed verdict. It is true that there was no request for a

directed verdict, but that is of no consequence here because appellant is not raising the issue of breach of contract. Appellant's position on this appeal, as shown by its statement of points (R. 268-269) and from its opening brief, is that the jury correctly decided this issue in appellant's favor, but that it then failed to properly assess the monetary amount of damages to which appellant was entitled—either because the jury completely disregarded some of the District Court's instructions, or because of the fact that other of such instructions were improper or inadequate. This question of inadequacy of damages was first presented to the trial court by appellant's motion under Rule 59 F.R.C.P., as it ought to have been, and it is the trial court's refusal to correct this miscarriage of justice that appellant now claims is such an abuse of discretion as to justify appellate review. See *United Press Association v. National Newspaper Association,* 254 F. 284, 286 (CA-8 1918); *Reisburg v. Walters,* 111 F. 2d 595, 598 (CA-6 1940). Consequently, the absence of a motion for a directed verdict is not relevant here.

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5. HARMLESS ERROR?

The standard contained in Rule 61 F.R.C.P. whereby it can be determined whether the action of a trial court should be reversed is whether such action was "inconsistent with substantial justice"—whether or not the "substantial rights" of the parties have been affected. Appellant submits that what it

has asserted here as error is in no way "harmless"; that its substantial rights have been affected and that there has been a miscarriage of justice.

Whether the action of the jury in refusing to assess damages after awarding a verdict in appellant's favor was the result of arbitrary action in simply refusing to follow the trial court's instructions, or was caused by reason of inadequate or improper charges by the District Court, the fact remains that the issue of liability was decided against appellees, the monetary amount of damages to which appellant then became entitled was beyond dispute and was simply a matter of mathematical computation, and the trial court had ample opportunity to rectify the situation either by setting aside the verdict and entering judgment for appellant or by granting a new trial. (R. 39-40.) But the court refused to do this (R. 41), and it is this action that appellant contends is such an abuse of discretion as to justify a reversal by this Court. The District Court's handling of this situation can hardly be termed "harmless", when appellant is thereby deprived not only of the $21,489.57 in damages to which it is clearly entitled, but also of the considerable costs to which it has been put in this litigation.

CONCLUSION.

For the reasons stated in appellant's opening brief, and in this brief, it is respectfully submitted that the judgment of the District Court should be reversed,

and that this case should be remanded with direction to enter judgment in favor of appellant in the sun of $21,489.57, together with appellant's costs and attorneys' fees.

Dated, Juneau, Alaska,
February 28, 1956.

JOHN H. DIMOND,
BAKER, HOSTETLER & PATTERSON,
DONALD D. WICK,
Attorneys for Appellant.

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14868

BESSIE LASKY and JESSE L. LASKY, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petitions to Review Decisions of The Tax Court of the United States

PETITIONERS' BRIEF

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FILED
FEB 25 1955

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PETITIONERS' BRIEF

JURISDICTIONAL STATEMENT

Jurisdiction of the Tax Court

Petitioners on review filed Federal Income Tax Returns for the taxable year 1943 with the collector of Internal Revenue for the Sixth District of California at Los Angeles, California, which is within the jurisdiction of this Court. (R. 19) On November 28, 1949, the Commissioner of Internal Revenue sent to petitioners, by registered mail, notices of deficiencies, in which he determined that the peti-

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tioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that the petitioner, Jesse L. Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.14. (R. 10-14, 62) Thereafter, on January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States. (R. 7-14) The case was tried before the Tax Court on April 8, 1954. The Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decision ordering and deciding that the taxpayers owe the deficiencies in income tax for the taxable year 1943 in the amount as determined by the Commissioner of Internal Revenue. (R. 92-93)

Thereafter, on August 24, 1954, petitioners filed a motion for leave to file a motion to vacate the decisions out of time and a motion to vacate decisions entered April 8, 1954. (R. 93-94) On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions of April 8, 1954, and granted the petitioners a further hearing on the merits. (R. 135) Thereafter, a re-hearing of the case was held in Washington, D. C., on January 21 and January 26, 1955. (R. 300, 355) On June 30, 1955, the Tax Court in the case of each petitioner entered a memorandum sur order and decision, again ordering and deciding upon the re-hearing and reconsideration of the case on the merits that there are deficiencies in income tax for the taxable year 1943 as determined by the Commissioner of Internal Revenue. (R. 138-145)

Jurisdiction of Court of Appeals

Petitions for review were filed on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955. (R. 149) Jurisdiction is conferred upon this Court by Sections 1141 and 1142 of the Internal Revenue Code of 1939 and Sections 7482 and 7483 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

On March 23, 1940, Jesse L. Lasky acquired from Sgt. Alvin C. York the exclusive motion picture, radio, television and dramatic rights to the life story of York. Thereafter, on May 15, 1940, Lasky conveyed all his rights, title and interest under the contract of March 23, 1940 with York to Warner Bros. In consideration for all his rights, title and interest under the contract of March 23, 1940, Warner Bros. agreed to pay Lasky $40,000 plus a certain percentage of the gross film rentals or sales realized from the distribution of the photoplay. In addition, by a separate and distinct contract, Warner Bros. employed Lasky as a co-producer for the purpose of producing the play based upon the life of Sgt. York. After the picture "Sergeant York" was released, a dispute and dissatisfaction existed between Lasky and Warner Bros. Lasky was dissatisfied with the way Warner Bros. was distributing the picture. He was also dissatisfied with the receipts that were tendered him from the distribution of the picture. After consulting his attorney, certain checks tendered to Lasky by Warner Bros. as his share of the film rentals were returned to Warner Bros. At that time it was contemplated that an accounting of the distribution by Warner Bros. would be demanded by Lasky. However, Lasky wished to avoid a dispute with Warner Bros. because he was then in their employ as a producer, and he decided to sell his rights under the contract of May 15, 1940, with Warner Bros. Accordingly, on December 4, 1942, he sold his rights under the contract of May 15, 1940, to United Artists Corporation for $805,000. Petitioners reported the gain from the sale as gain from the sale of a capital asset. The Commissioner of Internal Revenue determined, and the Tax Court held, that the gain resulting from the sale was taxable as ordinary income.

The question for decision is: Was the gain from the sale of petitioner's contractual rights with Warner Bros. to United Artists Corporation on December 4, 1942, taxable as ordinary income or as capital gain from the sale of a capital asset?

STATUTE INVOLVED

Internal Revenue Code (1939) as amended:

"Sec. 117. *Capital Gains and Losses.*

"(a) *Definitions.*—As used in this chapter—

"(1) *Capital assets.*—The term 'capital assets' mea property held by the taxpayer (whether or not co nected with his trade or business), but does not inclu stock in trade of the taxpayer or other property of kind which would properly be included in the inventor of the taxpayer if on hand at the close of the taxab year, or property held by the taxpayer primarily f sale to customers in the ordinary course of his tra or business, or property, used in the trade or busines of a character which is subject to the allowance for d preciation provided in section 23 (1), or an obligatio of the United States or any of its possessions, or of State or Territory, or any political subdivision thereo or of the District of Columbia, issued on or after Mar 1, 1941, on a discount basis and payable without inte est at a fixed maturity date not exceeding one ye from the date of issue, or real property used in t trade or business of the taxpayer.

"(2) *Short-term capital gain.*—The term 'short-ter capital gain' means gain from the sale or exchange a capital asset held for not more than 6 months, if a to the extent such gain is taken into account in co puting net income;

* * *

"(4) *Long-term capital gain.*—The term 'long-term ca ital gain' means gain from the sale or exchange of capital asset held for more than 6 months, if and to t extent such gain is taken into account in computing n income;"

STATEMENT OF THE CASE

Petitioners are husband and wife. They resided in Los Angeles, California during 1942 and 1943. Each filed separate income tax returns on the cash basis with the Collector for the Sixth District of California. Their income in 1942 [1] and 1943 was community income. For the purposes of this statement, Jesse L. Lasky will be referred to hereinafter as the petitoner.

The petitioner's occupation has been that of motion picture producer since 1913, and he has produced many pictures. Prior to March 1940, petitioner as an individual had not purchased any literary property, but as Vice President in charge of Production of Paramount, many literary properties passed through his hands. In the early part of 1940, petitioner negotated with Alvin York, a hero of World War I, for the purchase of the exclusive motion picture, radio, television and dramatic rights to the life story of York. On March 23, 1940, petitioner and York entered into an agreement which provided *inter alia* as follows: (Ex. 1-A, R. 25-26)

> "II. York further gives, grants, bargains, sells, assigns and sets over unto Lasky, his heirs, executors adminstrators, and assigns, the sole and exclusive right to use the name and likeness of York in connection with one or more story or stories, films or photoplays for motion picture, television and/or radio presentation and/or exhibitions based upon or using or containing one or more incidents in, of or from the life of York, including the right to dramatize, exhibit and/or present any incident occurring or which did occur in the life of York by every visual and/or audible means whether now known or hereafter invented or discovered. Such transmission or presentation may be through the use or by means of living actors in the actual and immediate presence of an audience or by any other and different

[1] The year 1942 is involved because of the provisions of The Current Tax Payment Act of 1943.

means, medium or device of whatsoever nature c description.

The name 'Alvin C. York' or any part, thereof, whethe alone or in connection or in conjunction with any othe word or phrase may, but need not be used in the tit or sub-title of any motion picture, play, story, nov or serial or radio or television presentation, fiction or otherwise, containing any one or more incidents i of or from the life of York, and the advertising and/c publicity relating to any motion picture, play, stor novel, serial or radio or television presentation writte made or produced pursuant to this agreement, whethe fictional or otherwise, may include the statement tha it is based upon, taken from or is the story of the li of Alvin C. York, or some similar statement."

In consideration for the rights received, petitioner pai York $25,000 upon the execution of the agreement of Marc 23, 1940 and agreed to pay an additional $25,000 at th expiration of either 18 months from the date of the execu tion of the agreement, or upon the date following the releas of any motion picture made pursuant to the agreemen whichever was earlier. Failure to pay the second $25,00 would result in termination of the agreement. In additio Lasky agreed to pay York a sum equal to 4 percent of th gross receipts from the distribution of each motion pictur in excess of $3,000,000; 5 percent in excess of $4,000,000 6 percent in excess of $6,000,000; and 8 percent in exces of $9,000,000. It was provided that if the contract shoul be assigned to a production or distribution corporation, th assignee would assume all of Lasky's obligations. (R. 64

Petitioner flew to Hollywood, California, where he ar rived on or about March 25, 1940. He shopped around t sell the story for the production of a motion picture base upon the life story of Sgt. York. He discussed the stor with Sam Goldwyn and with Paramount, but they were no interested in producing the picture. At this time he wa very much concerned about selling the picture because h

had paid $25,000 for the rights under the contract of March 23, 1940, with York, and he would owe $25,000 more within 18 months, or lose the first $25,000 which he had paid to York. Accordingly, he was anxious to sell the story to a producing company. (R. 64-65, 342-343). He then called on Harry and Jack Warner of Warner Bros., Inc., and they agreed to purchase Lasky's rights under the contract of March 23, 1940, with York. In addition they agreed to employ Lasky as the supervising producer of a picture based upon the life of Sgt. York. (R. 65)

Petitioner first went to Warner Bros. for the purpose of selling them all of his rights, title, and interest to and under the agreement of March 23, 1940, which he had acquired from Sgt. York. He reached an oral understanding with Warner Bros. regarding the purchase of his rights under the agreement of March 23, 1940, with York. After Warner Bros. had agreed to purchase his rights under the agreement of March 23, 1940, with York, he reached an oral agreement with Warner Bros. whereby he was employed as a supervising producer. Thereafter, written instruments were prepared and executed embodying the terms of the oral agreements. One agreement is dated May 8, 1940, by which Warner Bros. employed Lasky as the supervising producer of a photoplay tentatively entitled "The Amazing Story of Sergeant York." Another agreement is dated May 15, 1940, by which Lasky sold to Warner Bros. all of his rights to the York story and all other rights he had acquired under the York contract of March 23, 1940. A third agreement was simultaneously executed entitled "Supplemental Agreement" which also was dated May 15, 1940, by which Warner Bros. agreed to pay Lasky a part of the gross receipts in varying percentages from the distribution of the photoplay "The Amazing Story of Sergeant York." (R. 65, 161-164, 176-177, 200-201, 218, 341-343)

In general the agreement of May 8, 1940 provided that Lasky would render services as a supervising producer of

the York photoplay and such other photoplays as might be selected by mutual consent for a period of 52 weeks from April 1, 1940, and that Lasky would receive for all of his services under the contract at least $60,000, payable at the rate of $1,500 per week (R. 66-67). Under the agreements of May 15, 1940, Warner Bros. in general agreed to pay Lasky $40,000 for all of his rights, title, and interest in the York agreement of March 23, 1940, plus a part of the gross receipts from domestic and foreign distribution during no more than five years after the date of release of the York photoplays. Warner Bros. assumed all of Lasky's obligations under the York contract. (R. 67)

Under the "Supplemental Agreement" of May 15, 1940 which was a participation agreement, Warner Bros. agreed to pay Lasky 20 percent of the gross film rentals realized from the motion picture in excess of $1,600,000 from domestic proceeds and a similar percentage of the foreign proceeds in excess of $150,000 and when domestic and foreign proceeds reached $2,500,000 Warner Bros. would pay Lasky a sum equal to 25 percent of the excess above such figure instead of 20 percent (R. 68-69).

A photoplay entitled "Sergeant York" was produced. It was released in the United States and Canada in July 1941 (R. 69). After the picture "Sergeant York" was released petitioner was informed that Warner Bros. was not making a proper distribution of the picture. It was believed that Warner Bros. was renting the picture to theatres it owned and controlled at lower rentals than they rented it to independent theatres. In addition, it was felt "Sergeant York," a successful picture, was being used to sell less desirable pictures which were wholly owned by Warner Bros. This affected the percentage of the gross receipts due petitioner (R. 169-170, 241-242, 274-275, 277-279, 314-315, 345-347).

In November 1941, petitioner received a letter from Albert Warner dated November 24, 1941, pointing out that the cost of producing the picture "Sergeant York" was

more than had been anticipated. In the letter Warner Bros. requested petitioner to agree that he would not participate in a percentage of the gross rentals until the gross rentals exceeded $2,200,000 instead of $1,600,000 as provided in the supplemental contract. (R. 169-170, 255, 275, 313-314 346-348, Ex. 9 R. 444-445)

Petitioner consulted his attorney about the letter received from Warner Bros. dated November 24, 1941. His attorney advised that he was not required to change the terms of the supplemental contract with Warner Bros. and recommended that he not accede to the request contained in the letter of November 24, 1941. Accordingly, petitioner wrote a letter to Albert Warner on December 4, 1941, refusing to agree to the request that he not participate in the percentage of the gross rentals until the gross rentals exceeded $2,200,000 instead of $1,600,000 as provided in the supplemental contract. The letter contained in detail the reasons for petitioner's refusal. (R. 169-170, 313-314, 346-348, Ex. 10, R. 446-454)

Up until the time the petitioner refused to accede to the request contained in the letter from Warner Bros. dated November 24, 1941, very pleasant relationships existed between petitioner and his employer, Warner Bros. After the refusal to comply with the request contained in the letter of November 24, 1941, the relationship between petitioner and his employer, Warner Bros., became strained. (R. 255, 346)

Warner Bros. followed the practice of mailing statements to Lasky which were designated "Statement to Jesse L. Lasky covering distribution of production 'Sergeant York' to (date)," together with a check for the amount of Lasky's participating share as shown by the statement (R. 70).

When petitioner received his first statement which was mailed with a letter dated December 15, 1941, the statement showed gross income from distribution of the picture "Ser-

geant York" within the United States of $1,706,084.02 With this statement, petitioner received a check for $21, 216.80. Petitioner was disturbed upon the receipt of thi statement because the *New York Times* quoted gross rental to be $4,000,000 and trade magazines, *Variety* and *Reporter* were also quoting substantially higher figures than wer shown on the statement received from Warner Bros. Ac cordingly, petitioner consulted his attorney and an account ant about the situation. (R. 70, 76, 169-170, 279-280, 311 314, 326-327, 345-346; Ex. O, R. 417-418)

Upon the receipt of the first statement from Warne Bros., petitioner's attorney and accountant both advise him to have an audit made of the distribution of the produc tion "Sergeant York" but to wait until there was as broa a distribution as possible before having the audit made Petitioner at that time agreed to have an audit. R. 271-272 278-279, 285, 314-317, 329, 351-352)

After the receipt of the first statement from Warne Bros., petitioner's attorney advised him not to accept th checks which accompanied the statements covering the dis tribution of "Sergeant York" to February 28, 1942. Th same advice was given with respect to all subsequent state ments. Petitioner's attorney was of the opinion tha the legend on the vouchers would preclude petitione from demanding an adjustment in the account if it wa found he was entitled to additional moneys from Warne Bros. Petitioner's attorney returned three checks receive from Warner Bros. in 1942 totaling $570,698.62. (R. 77-78 241-242, 278, 315-316, 351-352)

Petitioner was requested by Warner Bros. to pay part o the cost of an advertising compaign to promote the pictur "Sergeant York". Under the contracts between petitione and Warner Bros., petitioner was not required to shar in the advertising cost. Petitioner consulted his attorney and was advised that he was not required and should no agree to share in the advertising cost. Despite this advice

petitioner, in an effort to placate Warner Bros. and to regain the friendly relationship between himself and his employer, did agree to and did pay a part of the advertising cost in the amount of $18,998.00. (R. 75, 170, 255, 316, 348; Ex. 6, R. 55-56; Ex. P, R. 418-420)

Warner Bros. was threatened with a plagiarism suit by the heirs of an author who had written a book based on the life of Sergeant York. As a result of the claim made by the Skeyhill heirs, Warner Bros. withheld $10,000 from the amount properly due petitioner in their statement covering distribution of the production "Sergeant York" to February 28, 1942. Petitioner had not agreed to the withholding of any amount upon the claim of the Skeyhill heirs and was not required under his contracts with Warner Bros. to pay any part of the alleged claim. Accordingly, petitioner consulted his attorney and accountant about Warner Bros. withholding the $10,000 on account of the alleged claim of the Skeyhill heirs. (R. 76, 270-271, 279-280, 349)

On about May 6, 1942, Lasky instructed Warner Bros. to send future statements of account and participation checks, and other matters directly to his attorney. (R. 76) The statement of Warner Bros. covering distribution of the production "Sergeant York" to February 28, 1942, showed foreign income from distribution. Petitioner discussed the income from foreign distribution with his attorney and accountant who raised a question about the propriety of Warner Bros. classifying earnings in England as restricted funds. Question was also raised about a deduction for quota losses in England. Question was also raised as to the possibility that Warner Bros. might be using the blocked funds in England for their own expenditures. Warner Bros. proposed to withhold $200,000 of foreign receipts due petitioner. Mr. Wright, petitioner's attorney, discussed the proposal with officials of Warner Bros. and pointed out that Warner Bros. was not entitled to withhold the foreign funds from petitioner. (R. 76-77, 80, 169, 241-242, 255-256, 274, 280-281, 316-319)

Although petitioner's attorney and accountant advise
him to have an audit made of the distribution of the pr
duction "Sergeant York", petitioner was reluctant to do
because he felt that an audit would show discrepancies ar
that he was entitled to additional moneys. If the aud
showed discrepancies, his position as an employee
Warner Bros. would become untenable. Petitioner ha
been working for different studios and wanted to contin
in the employ of Warner Bros. for the remainder of h
life. He did not want a controversy at this time wi
Warner Bros., and, therefore, he acquiesced in Warn
Bros. retaining the $10,000 to pay the possible plagiaris
claim. (R. 256, 274, 349-350)

Warner Bros. was aware that petitioner was dissati
fied with the distribution and his receipts from the distrib
tion of the picture "Sergeant York". R. 281, 303-304, 30
359-362)

The reason petitioner sold his rights under the contra
of May 15, 1940, and the supplemental contract of May 1
1940, between petitioner and Warner Bros., to United A
tists Corporation, on December 4, 1942, was to avoid ar
additional unpleasantness or controversy and in order
be able to continue in the employ of Warner Bros. as
producer for the balance of his natural life. Petitione
felt that if he disposed of his rights under the contrac
of May 15, 1940, he would be able to continue in the emplo
of Warner Bros. without any further trouble or disput
Therefore, instead of having an audit investigation, pet
tioner decided to sell his rights under the contracts. (
78, 169-170, 254-256, 258, 274-275, 349-350)

Petitioner did not personally handle any of the negoti
tions leading to the sale of his rights under the contrac
of May 15, 1940, to United Artists on December 4, 194
Loyd Wright, petitioner's attorney, handled the negoti
tions. Mr. Wright communicated with Mr. Adolph Zuk

and United Artists Corporation in an effort to sell petitioner's rights under the contracts of May 15, 1940. Mr. Zukor, in conjunction with some other persons, offered to purchase Mr. Lasky's rights under the contracts of May 15, 1940, for $800,000. Later, Mr. Wright was able to sell the rights to United Artists Corporation for $805,000. Petitioner was advised that this was a fair offer and agreed to sell. (R. 80, 254-256, 281-282, 286-287, 322-323 330, 350-351, 353)

Under the contract of December 4, 1942, petitioner sold to United Artists all his interest in the original and supplemental agreements with Warner Bros. dated May 15, 1940, and all his interest in the motion picture "Sergeant York", including the proceeds thereof, rights of accounting thereof, money due or to become due thereof, from Warner Bros. Pictures, Inc. (R. 81, Ex. 7-B, R. 56)

Prior to selling the rights under the contracts of May 15, 1940, to United Artists Corporation, petitioner had no knowledge or understanding that United Artists Corporation intended to resell the rights to Warner Bros. (R. 324, 351, 360-361)

The sale of petitioner's rights under the contracts of May 15, 1940, to United Artists was negotiated between Mr. Wright, attorney for petitioner, and Mr. Edward C. Raftery, President and chief counsel of United Artists. During the negotiations, Mr. Raftery consulted with Mr. Gradwell Sears, the General Sales Manager of United Artists, who had previously been employed by Warner Bros. as General Sales Manager at the time the picture "Sergeant York" was released. Mr. Raftery was only interested in buying Lasky's rights if United Artists Corporation could make some money by acquiring the rights. Sears advised Raftery that the picture had a great potential and to buy petitioner's rights. He made the recommendation to buy because he thought United Artists Corporation could make

money out of the transaction. (R. 141-142, 284, 286-28
302-304, 357-360, 373-374)

Sears, the General Sales Manager, wanted United Artis
Corporation to hold the rights it acquired from petitione
and not resell them. Sears advised Raftery that the pi
ture was an enormous success and if it held the righ
United Artists Corporation would receive over a millio
dollars itself. However, Mr. Raftery wanted to resell th
Lasky interest for two reasons: (1) because United Artis
Corporation did not have the right to distribute the pi
ture, and (2) in order to make a quick profit. Therefor
United Artists Corporation sold the rights to Warne
Bros. on December 22, 1942. (R. 303-304, 324, 357-36
364-365, 371, 373-374)

Warner Bros. purchased the rights United Artists Co
poration had acquired from petitioner under contract date
December 22, 1942, for $820,000. It insisted that the selle
United Artists Corporation, on behalf of Jesse L. Lask
fully release Warner Bros. from any claims that Lask
might have in and to the receipts from the distributio
and exhibition of the picture "Sergeant York". (R. 36
362, Ex. AA, R. 439)

Petitioners reported in their return for 1942, one-ha
of the payment of $805,000 as long term capital gain fro
the sale of a capital asset. The Commissioner of Intern
Revenue rejected this treatment of the receipt of $805,00
and taxed the entire amount as ordinary income. The ta
Court sustained the Commissioner. (R. 84-85)

SPECIFICATION OF ERRORS

The Tax Court of the United States erred:

1. In holding and deciding that the proceeds from th
sale by petitioner Jesse L. Lasky of his rights under co
tracts of May 15, 1940, with Warner Bros., to United Artis
Corporation, for $805,000, were taxable as ordinary incom
instead of at capital gains rates.

2. In failing to hold that the proceeds from the sale by petitioner Jesse L. Lasky of his rights under contracts of May 15, 1940, with Warner Bros., to United Artists Corporation were taxable as the sale of a capital asset.

3. In failing to hold that the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which petitioner Jesse L. Lasky sold to Warner Bros. all his rights to the "Sergeant York" story and Warner Bros. agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay, are entirely separate and distinct from the employment contract between petitioner Jesse L. Lasky and Warner Bros. dated May 8, 1940.

4. In holding that petitioner Jesse L. Lasky received royalties under his contracts of May 15, 1940, with Warner Bros.

5. In holding that petitioner's right to a share in the proceeds of the motion picture "Sergeant York" was due to his contribution as a producer.

6. In holding that the evidence failed to show that a bona fide dispute existed in 1942 between petitioner Jesse L. Lasky and Warner Bros.

7. In holding that the sale by petitioner Jesse L. Lasky, on December 4, 1942, to United Artists Corporation was not a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Bros.

8. In holding that United Artists Corporation was a mere intermediary in the transaction whereby petitioner Jesse L. Lasky sold his rights under the contracts of May 15, 1940, with Warner Bros. to United Artists Corporation.

9. In holding that there was no business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

10. In determining that petitioner Jesse L. Lasky pr
ferred to have his share of the preceeds from the pictu
"Sergeant York" accrue and accumulate in the hands
Warner Bros.

11. In holding on rehearing that: "It is concluded th
Lasky sold his accrued earnings in the picture Sergea
York, which amounted to $822,857.56, to United Artists
a 'discount' of over $17,000, and that United Artists co
lected from Warner Brothers, Lasky's share of the accru
earnings to the extent of $820,000, thereby bringing abo
Warner Brothers' acquisition of the 25 per cent intere
of Lasky for no more than the accrued earnings of the
per cent interest."

12. In holding and deciding after the rehearing and r
consideration that the proceeds from the sale by petition
Jesse L. Lasky of his rights under contracts of May 1
1940, with Warner Bros. to United Artists Corporatio
for $805,000, were taxable as ordinary income instead
at capital gains rates.

13. In holding and deciding that petitioner Bessie Lasl
owed a deficiency in income tax for the year 1943 in t
amount of $224,722.55.

14. In holding and deciding that petitioner Jesse
Lasky owed a deficiency in income tax for the year 19
in the amount of $224,515.14.

15. In that its opinion and decisions are not supporte
by the evidence.

16. In that its opinion and decisions are contrary to la

ARGUMENT

The gain from the sale of petitioner's contractual rights with Warner Bros. to United Artists Corporation on December 4, 1942, is taxable as capital gain from the sale of a capital asset.

The question here presented for decision is whether the gain realized by petitioner upon the sale of certin contractual rights to United Artists Corporation on December 4, 1942, is taxable as ordinary income or as capital gain. The Tax Court by disregarding uncontradicted and unimpeached testimony of reputable witnesses and by drawing unwarranted inferences and conclusions in the teeth of positive evidence to the contrary decided that the transaction was a sham and that the gain was taxable as ordinary income. In addition the Tax Court misinterpreted and misapplied the law to the facts. To resolve the question here involved, the Tax Court considered first the transaction whereby petitioner acquired certain rights by contract from Sgt. York which were sold to Warner Bros. and, secondly, the transaction of December 4, 1942, whereby the petitioner sold to United Artists Corporation the contractual rights he had with Warner Bros. The important thing to determine is what was purchased and what was sold in each transaction.

The contract of March 23, 1940, between petitioner and Sgt. York conveyed to Lasky the exclusive motion picture, radio, television, and dramatic rights to the life story of York. This contract was a valuable property right. Petitioner by contract dated May 15, 1940, conveyed all of his rights, title, and interest under the contract of March 23, 1940, with York, to Warner Bros. It is important to determine exactly what Lasky sold to Warner Bros. As can clearly be seen from the contract, petitioner sold all of his rights, title and interest under the contract with York, to Warner Bros. (R. 38-40) It was not merely a licensing or rental agreement. Petitioner sold all of his "bundle of

rights" under the contract. The contract of May 15, 194 between petitioner and Warner Bros. Pictures, Inc., speci ally provided: (R. 39)

> "In consideration of the covenants of the Purchas herein contained and of the payment of the sums the times and in the manner hereinafter provided, t Seller does hereby grant and assign to the Purchas all the right, title and interest of the Seller in, to under the said agreement of March 23, 1940, (Exhib 'A'), together with any and all rights, licenses and/ privileges acquired by him therein and thereunder."

In consideration for all of petitioner's rights, title and i terest under the contract of March 23, 1940, Warner Bro agreed to pay petitioner $40,000 plus a certain percenta of the gross film rentals or sales realized from the distrib tion of the photoplay.[1]

The foregoing facts clearly distinguish the transactio in the instant case from those in *Sabatini* v. *Commissione* (CA-2, 1938) 98 F. 2d 753, 21 A.F.T.R. 800; *Goldsmith Commissioner,* (CA-2, 1944) 143 F. 2d 466, 32 A.F.T.R. 100 cert. denied 323 U.S. 774; *Rohmer* v. *Commissioner,* (CA- 1946) 153 F 2d 61, 34 A.F.T.R. 826, cert. denied 328 U.S 862; *Commissioner* v. *Wodehouse,* (1949) 337 U.S. 369, 9 L.Ed. 1419. In each of these cases, authors who held cop rights conveyed or licensed to others certain rights les than all of the author's "bundle of rights" under his cop right. In other words, they did not sell their entire intere but merely licensed their work for a particular object period. There was no transfer of title necessary to a con

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[1] The mere fact that part of the payment on the sale by petitioner to Warn Bros. was a percentage of the gross receipts does not prevent capital ga treatment. The method of payment, whether it be a flat sum, fixed instal ments or payment of a percentage of the gross receipts, sales or profits, do not change the fact that a sale occurred. *Commissioner* v. *Celanese Cor* (USCADC, 1944) 140 F. 2d 339, 32 A.F.T.R. 42; *Commissioner* v. *Hopkins* (CA-2, 1942) 126 F. 2d 406, 28 A.F.T.R. 1349; cf. *Raymond M. Hesse* ¶47,301 P-H T.C. Memo.

pleted sale. Here, Lasky conveyed all of his rights under the contract of March 23, 1940, with Sgt. York to Warner Bros. There was a completed sale. Petitioner reported the income under the contracts with Warner Bros. during the year 1941 as ordinary income because at the time of the sale to Warner Bros., he had not held the property rights in the contract with Sgt. York for the requisite holding period so as to be entitled to report the proceeds of the sale as long-term capital gain. Respondent, in his brief in the Tax Court, admitted that the sale by petitioner of his rights under the contract of March 23, 1940, to Warner Bros. was the sale of a capital asset, but argued it was not a long-term capital gain because petitioner held the rights less than one month. Had petitioner held his rights the necessary holding period, the gain would have been a long-term capital gain under the cases of *Herwig et al.* v. *United States,* (1952) 122 Ct. Cl. 493, 105 F. Supp. 384, *Fred MacMurray,* (1953) 21 T. C. 15, and *Anatole Litvak,* (1954) 23 T. C. 441. Accordingly, it is the petitioner's position that the moneys received by Lasky during the year 1941 under the contracts of May 15, 1940, with Warner Bros. were proceeds from the sale of Lasky's property rights under the contract of March 23, 1940, with York, and not royalties, as determined by the Tax Court.

After the picture "Sergeant York" was released in July 1941, a dispute and dissatisfaction existed between petitioner and Warner Bros. Petitioner was dissatisfied with the way Warner Bros. was distributing the picture. He was also dissatisfied with the receipts that were tendered him from the distribution of the picture. He consulted his attorney and accountant regarding what action he should take. They advised him to have an audit made of the distribution of the picture by Warner Bros. His attorney also advised him not to accept the proceeds from the distribution of the picture "Sergeant York" tendered him by Warner Bros. as it might preclude him from demanding an adjustment in the account if it were found he was entitled to one upon an accounting. By the very re-

turn of the checks tendered, Warner Bros. was placed on notice of petitioner's dissatisfaction. Petitioner's attorney had a conference with executives of Warner Bros. about criticisms which he had heard about Warner Bros.' handling of the York picture. (R.281) Warner Bros. was aware that petitioner was dissatisfied with the distribution and his receipts from the distribution of the picture "Sergeant York". Officials of Warner Bros. expressed to third parties that they were cognizant of the fact that petitioner was dissatisfied.[2] (R.361-362) Likewise, Warner Bros. was dissatisfied with the arrangements they had made under the contracts with Lasky. By letter of November 24, 1941, Warner Bros. requested petitioner to increase the base before he would begin to participate in the percentage of gross rentals from $1,600,000 to $2,200,000. They requested him to participate in an advertising campaign although he was not required to do so under his contract. They withheld moneys due petitioner because of a claim of plagiarism although they were not justified in doing so under the contracts. They proposed to withhold $200,000 of foreign receipts due petitioner although they were not entitled to do so under the contracts.

During all this period of time, petitioner was in the employ of Warner Bros. as a producer. Prior to 1940 petitioner had been employed from time to time as a producer by a number of different companies. He was interested in avoiding any additional unpleasantness or controversy with Warner Bros. in order that he might continue in their employ as a producer for the balance of his natural life. For this reason, petitioner was reluctant to have an audit made because he felt that an audit would show discrepancies and that he was entitled to additional

[2] In the contract between United Artists Corporation and Warner Bros. Pictures, Inc., of December 22, 1942 (R. 439-444) Warner Bros. required United Artists to release it from all claims that Lasky might have against Warner Bros. relating to the motion picture "Sergeant York." This showed that Warner Bros. was familiar with Lasky's claims and his dissatisfaction.

moneys. Petitioner realized that by having an audit made, his position as an employee of Warner Bros. would become untenable. Petitioner felt that if he could dispose of his rights under the contracts of May 15, 1940, he would be able to continue in the employ of Warner Bros. without any further trouble or dispute. In other words, if he no longer held the rights under the contracts he would not be concerned with the distribution or the receipts from the distribution of the picture. Likewise, Warner Bros. would not be able to make any further demands on him for concessions under the contracts. Accordingly, the business purpose to Lasky behind the sale of his rights in the contract with Warner Bros. Pictures, Inc., of May 15, 1940, to United Artists Corporation on December 4, 1942, was to put an end to the dispute and dissatisfaction which existed between him and his employer in order that he might continue thereafter in the employ of Warner Bros. as a producer. This evidence shows that the Tax Court was clearly wrong in concluding that there was no showing of any business purpose to Lasky in his contract with United Artists on December 4, 1942. (R-90).

The Tax Court was likewise in error in concluding that United Artists was a mere intermediary in the proceedings. The evidence shows that the sale by petitioner on December 4, 1942, to United Artists was a bona fide sale to a third party without any knowledge or understanding on petitioner's part whatsoever that United Artists Corporation would resell the rights they acquired to Warner Bros. The evidence shows that petitioner's attorney offered to sell petitioner's rights under the contracts with Warner Bros. to Adolph Zukor and to United Artists Corporation. He sold the rights to United Artists Corporation because they agreed to pay him the most money for the rights. The testimony of the President of United Artists Corporation and the General Sales Manager shows that their only purpose in acquiring the rights of petitioner under the con-

tracts of May 15, 1940, with Warner Bros., was a busines purpose. They were only interested in buying the right if United Artists Corporation could make a profit out o the transaction. The General Sales Manager of Unite Artists Corporation wanted to acquire the rights and hol them so that United Artists would receive the proceed from the distribution of the photoplay over a period o time. On the other hand, the President of United Artist was interested in making a quick profit out of the trans action by reselling the rights. His reason for doing s was that he wanted to make a quick profit in the year 194 and also because United Artists did not have the right t distribute the picture.

The Tax Court, in its order and decision on rehearing stated:

> "* * * The Court concludes that the transaction o United Artists with Lasky, and the transaction o United Artists with Warner Bros. shortly thereafte must be considered together and that although Lask may not have been aware of all the discussions an considerations of his chief agent, his attorney, neve theless, his agent's actions must be imputed to Lasky * * *" (R. 140-141)

This conclusion of the Tax Court completely disregard the uncontradicted evidence before it and is made in th teeth of the only evidence in the record. Mr. Loyd Wrigh the attorney for Lasky, who negotiated the sale, testifie that he did not know about the sale from United Artist to Warner Bros. on December 22, 1942, until after it wa an accomplished fact. This testimony appears in the rec ord on page 283, as follows:

> "Q. (By Mr. McLane): I show you a contract o sale, marked Exhibit AA, Mr. Wright, and ask whethe or not your firm represented United Artists in th transfer of the rights under that contract to Warne Brothers on December 22, 1942?

"A. No. We had nothing whatever to do with it.

"Q. You mean United Artists had other legal advice other than yourself?

"A. That is handled in the New York office. I never had seen it. I had no knowledge of it until after it was accomplished."

Likewise, Mr. Miller and Mr. Lasky also testified that they had no knowledge that United Artists contemplated or intended to resell Mr. Lasky's rights to Warner Bros. (R. 324, 351). In addition, Mr. Raftery, President and Chief Counsel for United Artists Corporation, testified that he never saw Mr. Lasky during the negotiations leading to the contract of December 4, 1942, and that he had no understanding of any kind with Mr. Wright that he would transfer or resell the rights United Artists acquired from Mr. Lasky to Warner Bros. (R. 360-361)

Viewed in the light of this evidence, it is clear that the transaction of December 4, 1942, whereby petitioner sold his rights under the contract to United Artists Corporation, was a bona fide transaction surrounded by good business reasons on behalf of all parties. It may be that the petitioner from a financial standpoint made a poor "deal". However, it was a transaction that was entered into honestly and as the result of advice from his advisors. Under these circumstances the Court will not be concerned with the quality of the consideration petitioner gave or received but only with the taxability of that which he received. The payment of the $805,000 was made by United Artists Corporation to acquire all of his rights and property of every kind whatsoever under his contracts of May 15, 1940, with Warner Bros. The contractual rights sold to United Artists Corporation were entirely different from those sold to Warner Bros. on May 15, 1940. Warner Bros. was sold petitioner's rights under contract with York of March 23, 1940. The property rights under the contracts of May 15, 1940, had been held by petitioner for more than six months

and since he transferred all of his right, title and intere under the contracts to United Artists Corporation, it wa a completed sale and the proceeds are entitled to be treate as capital gain.

Petitioner is unable to find any appellate court cases tha are directly in point with the issue here presented. Hov ever, in the recent case of *Pat O'Brien et al.*, 25 T. C. N 48 (decided November 30, 1955) the Tax Court passed upc the identical issue here involved and there held that th sale of a percentage of the net profits of a picture was th sale of a capital asset. In the *O'Brien* case, petitioner Ph L. Ryan on August 29, 1945, sold to RKO Pictures, Inc his option on the story from which the motion pictu "Fighting Father Dunn" was made. He received a 10 pe cent interest in the net profits of the picture and a contra to produce the picture at a salary of $30,000. In Jul 1947, he sold one-half of his 10 percent interest in the n profits to a director of the film and reported the prof thereon as long-term capital gain. The Tax Court the said:

> "The fifth and final issue is whether the respon ent erred in determining that the profit realized b Phil L. Ryan from the sale of one-half of his 10 pe cent interest in "Fighting Father Dunn" constitute ordinary income rather than capital gain. We thin the respondent's determination was erroneous.
>
> "The attorney for RKO, who testified at the hea ing, made it very clear that RKO purchased the stor by giving Ryan a 10 per cent interest in the net profi of the picture and by employing him as the produce of the picture at a salary of $30,000. RKO paid $50 000 to the author of the story and gave him a 5 pe cent interest in the net profits of the film.
>
> "The respondent argued on brief that the story, o the option thereon, could not be a capital asset i Ryan's hands since his previous activity in purcha ing and selling stories indicated that he was in th business of doing so. That argument misses the poi altogether. What Ryan sold in 1947 was not the stor

but an entirely different asset, namely, one-half of his 10 per cent interest in the net profits of the motion picture. The record as a whole indicates that Ryan was not in the business of buying and selling interests in motion pictures. Hence, his 10 per cent interest in "Fighting Father Dunn" was a capital asset which he had held for more than six months prior to the time when he sold one-half of it. The profit on such sale was a capital gain."

In Pacific Finance Corporation of California ¶53,129 P-H Memo T.C., the petitioner purchased for $450,000 the first $550,000 of gross receipts of the photoplay "Rebecca" from the producer David O. Selznick and associates. After receiving approximately $375,000 the petitioner sold its interest in the photoplay to Vanguard Films, Inc., for about $175,000 thus realizing a gain of $100,000. Vanguard Films, Inc., was a company owned by Selznick. The Tax Court held that the gain of $100,000 on the sale was capital gain.

In the instant case, what Lasky sold to United Artists on December 4, 1942, was his interest in the motion picture "Sergeant York." Petitioner had held these property rights from May 15, 1940. Accordingly, petitioner's interest in the motion picture constituted a capital asset since it was not (a) stock in trade of the taxpayer or other inventory property; (b) property held primarily for sale to customers in the ordinary course of his trade or business; (c) depreciable property used in trade or business; or (d) short term government obligations. The decision in the case at bar is out of step with the *O'Brien* and *Pacific Finance Corporation of California* cases and the statute taxing the gain on the sale of a capital asset.

The opinion of the Tax Court in this case wholly disregards the proven facts. It states conclusions not based on the evidence. The opinion states: "Lasky, for reasons which are rather vague in the record before us, elected not to take the shares which accrued periodically and were

tendered to him until it became clear that the credits alo
would suffice because Lasky preferred having the accrua
of his shares accumulate in the hands of Warner Bros
(R. 88-89) There was positive evidence in the record wh
Lasky did not accept the moneys tendered to him by Wa
ner Bros. Loyd Wright, his attorney, advised him n
to accept the moneys that were tendered because in h
opinion the legend on the vouchers would preclude Lasl
from demanding an adjustment if it were found that
was entitled to additional moneys. (R. 72, 241-242, 27
316, 351-352) Accordingly there was nothing vague abo
petitioner's rejection of the tender—he acted on the advi
of counsel. There is no evidence in the record that pe
tioner "preferred" having his shares accumulate in t
hands of Warner Bros.

The opinion states: "It is difficult to know, or find as
fact, that a bona fide dispute existed in 1942 between Lasl
and Warner Bros." (R. 89) This is an astonishing concl
sion in the light of all the evidence about the dissatisfacti
and controversy that existed between Lasky and Warn
Bros. The details and causes of the dispute will not
reiterated here. However, the correspondence betwe
the parties, their expressions to third parties, and the fa
that Lasky consulted his attorney and accountant abo
the controversy and the fact that the attorney took t
matters up with Warner Bros. showed beyond questi
that disputes and dissatisfaction existed between the pa
ties. This evidence cannot be disregarded.

The opinion states: "For example, there is no testimo
of any executive of Warner Bros. about any dispute
about the receipt by Warner Bros. of allegations of Lasky
(R. 89) Lasky had a dispute with Warner Bros. Nat
rally its executives are not going to testify on his beha
However, this does not justify the Tax Court in disregar
ing all the other testimony and other evidence in the re
ord on this point. Petitioner's attorney had a conferen

with officers of Warner Bros. about the treatment of the picture. (R. 281) The very fact that the checks were returned placed Warner Bros. on notice of petitioner's dissatisfaction. Officers of Warner Bros. expressed to third parties that they were cognizant of the fact that petitioner was dissatisfied. (R. 303-304, 360-362) In addition, Warner Bros. required United Artists to release it from all claims that Lasky might have against Warner Bros. relating to the picture "Sergeant York." (R. 439-444)

The Tax Court in substance concludes that the sale by Lasky to United Artists was a sham and accomplished no more than an ending of the Warner Bros.-Lasky agreement, with United Artists as a mere intermediary. The business reasons behind each transaction shows this conclusion to be wrong. The uncontradicted testimony of unimpeached witnesses to the contrary cannot be disregarded.

CONCLUSION

A fair review of the evidence in this case leads to the inescapable conclusion that the sale by petitioner of his property rights to United Artists Corporation, on December 4, 1942, was a sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code of 1939. The decisions of the Tax Court should be reversed.

Respectfully submitted,

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February 23, 1956

No. 14868

In the United States Court of Appeals for the Ninth Circuit

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT THEREOF

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FILED
MAR 26 1956
PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals
for the Ninth Circuit

No. 14868

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes now the respondent, Commissioner of Internal Revenue, and moves this Court to dismiss the petitions for review filed herein for lack of jurisdiction. As grounds for this motion respondent states taxpayers' petitions for review were not filed within three months after the decisions of the Tax Court were rendered as required by Section 1142 of the Internal Revenue Code of 1939, and Section 7483 of the Internal Revenue Code of 1954. Decisions in the case of each taxpayer respectively were rendered by the Tax Court on April 8, 1954. (R. 92-93.) Petitions for review by this Court were not filed until August 10, 1955. (R. 6, 145-149.)

The facts, which are not in dispute, stated in support of this motion are as follows:

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in the above-entitled con-

solidated cases (R. 62-92) after hearing had befor
Judge Harron on December 10 and 11, 1951, and th
subsequent filing of briefs by both sides (R. 2-3).

The opinion concluded with the following word
(R. 92): "Decisions will be entered for the respon
ent." On April 8, 1954, the Tax Court rendered i
decision in the case of each of the taxpayers, decidi
in the case of taxpayer Bessie Lasky that there is
deficiency in income tax for the year 1943 in the amou
of $224,722.55, and in the case of taxpayer Jesse
Lasky that there is a deficiency in income tax due f
the year 1943 in the amount of $224,515.14. (R. 92-93
A copy of each of these decisions was, as appears belo
served by the Clerk of the Tax Court on April 9, 195
by registered mail on Mr. Herschel B. Green, the fir
attorney of record for the taxpayers in the Tax Cou
proceeding. (R. 92-93.)

No petition for review of these decisions in the Cou
of Appeals was served within three months after Apr
8, 1954, the date the decisions were rendered.

Up to this point taxpayers had been represented i
the Tax Court by Messrs. Herschel B. Green and Loy
Wright of Wright, Wright, Green and Wright, an
Mr. Harrison Harkins. (R. 62.) However, on
about August 24, 1954, after expiration of the thre
months' period following the rendering of the decisio
by the Tax Court, the present attorney for taxpaye
filed with the Tax Court a motion for leave to file
motion to vacate its decisions here out of time. (R. 9
94.) This motion was granted and taxpayers moved t
vacate the decisions entered in these cases on April
1954, by a motion lodged on August 24, 1954. (R. 94.
On September 10, 1954, taxpayers filed four affidavit
in support of this motion to vacate the decisions o

April 8, 1954, made respectively by taxpayer Jesse L. Lasky, his secretary, Randolph Rogers, and his attorneys Herschel B. Green and Harrison Harkins, each dated September 7, 1954. (R. 95.) The facts stated in these affidavits are in substantial agreement and from them the following appears:

Mr. Herschel B. Green was one of the attorneys of record for taxpayers in the Tax Court, connected with the firm of Wright, Wright, Green and Wright with offices at 111 West 7th Street, Los Angeles, California. (R. 101.) Shortly after April 8, 1954, there were received at these offices the findings of fact and opinion of the Tax Court in these cases and shortly after the receipt of the opinions and on April 14, 1954, there was held a conference at these offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Loyd Wright and Mr. Green. (R. 95, 101.) At this conference the findings of fact and opinion of the Tax Court were discussed as well as what future action should be taken, including such matters as the possibility of appeal or compromise. (R. 95-96, 99, 101-102, 103-104.) During the course of this conference Mr. Lasky was told that the decisions of the Tax Court in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky immediately upon receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102-103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant

was asked if the Decisions had been received, an
Affiant informed him on each occasion that the
had not. During one or two telephone conversa
tions with Mr. Harkins, we made mention of th
fact that the Decisions had not been received an
that Affiant was keeping a constant lookout for th
receipt [sic] of these Decisions, having in mind th
ninety-day appeal period above referred to.

On or about July 26, 1954, Mr. Harkins informe
Affiant that he had received word from the desk o
the Tax Clerk that the Decisions had been entere
in the two cases on April 8, 1954, and that copie
thereof had been mailed to us. Affiant thereupo
made an immediate search of the Lasky files i
his office, and at that time and for the first time dis
covered copies of the two Decisions. They were o
letter-size paper and had been permanently place
in one of the Lasky files on the correspondence sid
of the file rather than the legal side. Affiant there
upon, on that same day, telephoned Mr. Lasky an
informed him that in going through his files Affian
had found the two Decision[s] and *they* they [sic
were dated April 8, 1954.

Mr. Green also wrote Mr. Lasky under date of Augus
5, 1954, as follows (R. 98):

Agreeable to your telephone request, there ar
enclosed the decisions of The Tax Court in Mr
Lasky's and your tax cases.

You will note that these decisions are dated Apr
8, 1954. They did not come to my attention until
discovered them in going through the file last week
They came in separately from the two opinions an

were apparently here in the office at the time when we held the conferences with Judge Milliken, Mr. Harkins and others to discuss the contents of the Court's opinion.

I had been on the look-out for these decisions from the inception due to our discussions relative to an offer in compromise.

Mr. Harkins, who was also one of the attorneys of record, stated that under date of July 20, 1954, he wrote the Clerk of the Tax Court and inquired about the status of the proceedings and (R. 105)—

That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;

That on July 26, 1954, your affiant informed Mr. Green of the communication from the Clerk of the Court; and Mr. Green on the same date informed your affiant that copies of the decisions had been found in the files of his office;

That on July 26, 1954, Jesse L. Lasky informed your affiant that Mr. Green had that day told him that copies of the decisions had been served on Mr. Green.

Taxpayers' motion to vacate the decisions was heard by Judge Harron on September 14 and 16, 1954 (R. 106-133), where taxpayers were represented by their present counsel, who, as aforesaid, had not had any prior association with the case (R. 115). From the state-

ment of the court and counsel the following addition
facts appear:

The court stated (R. 114):

> Now, the records of the Tax Court show that t
> decisions in Docket Nos. 26396 and 26397 were se
> by registered mail and, as I understand from M
> Ash's statement, the Petitioners here do not de
> that copies of the order of this Court, which
> called a decision, were received in the office of M
> Herschel B. Green in Los Angeles under registere
> mail. The decisions were mailed to Mr. Green
> office because he was the attorney who first entere
> his appearance.

Further it appeared without dispute that there w
no record in the Tax Court of the receipt of any lett
of inquiry prior to Mr. Harkins' letter to the Cle
dated July 20, 1954 (R. 114-116), and that the thr
months had expired on or about July 8, 1954 (R. 116
Judge Harron stated that she had never received a
letter of inquiry from counsel. (R. 116, 126-127
The court pointed out that the findings and opinio
indicated that the decision either was not to be entere
here under Tax Court Rule 50, which would have r
quired a computation, but was expressly stated to
entered for the respondent (R. 116-117) and in this co
nection the court observed (R. 119):

> So the question must come up as to why no i
> quiry was made until July 20 about the decisio
> since the legend under the findings of fact and opi
> ion said, "Decision will be entered for the R
> spondent." There was no Rule 50 computation
> be made. The order of decision was entered in

mediately upon the "filing" officially of that findings of fact and opinion.

At the adjourned hearing on September 16, 1954, there transpired the following colloquy between court and counsel here pertinent. The court inquired (R. 126-128):

> I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch [Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. It is very easy to find out from the Clerk whether the judge is on the job or is sick, or is in Washington or away on a Calendar, and what I cannot understand is what Mr. Harkins, who tried this case, was thinking of.
>
> What did he think I was doing? Why did he think it would take me three months to have prepared and signed an order which takes not more than a half hour to get done?
>
> I have looked in the file to see if there was a motion for reconsideration filed or if there was any motion pending that would give Mr. Harkins or any of the counsel ground for thinking that while a motion for reconsideration was being considered a decision would not be entered or something. Have you any explanation?
>
> Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize

that the decision would be simultaneous practicall
with the findings of fact and opinion except in som
unusual situations like you mentioned. The onl
possible explanation is that, of course, Harkin
did repeatedly ask Mr. Green if the decisions ha
come down and was assured that they had not.

As I understand it, for some reasons the Ta
Court sent copies of the findings of fact and opi
ion to each of the counsel of record but, of cours
following the established practice that we all know
the decisions went only to Mr. Green.

The Court: That still does not give me an answe
to the question.

Mr. Ash: I do not know the answer.

The Court: Mr. Harkins could call Mr. Gree
20 times and Mr. Green could say "We haven
received a copy of the decision." What woul
Mr. Harkins think I was doing at this end of th
rope?

Mr. Ash: If I were in their position, I woul
make some inquiry after maybe a week or two t
find out if the decisions had been entered.

The Court: I must say that while we all observ
the formalities—we must observe the judicia
position; otherwise we are always available to cou
sel to answer their questions and consider thei
problems. I cannot locate in the record motion
that might have been considered as a reason for d
laying the entering of the decisions.

Mr. Ash: I cannot understand it and I wa
astonished as could be when I first heard of th
thing, which was just shortly before Mr. Heubus
of our office came down and looked through the fi

and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though regretting that the situation had arisen, made clear through his counsel his objection to the granting of the motion to vacate on the ground that the Tax Court was without jurisdiction in the premises (R. 112-113) and filed a memorandum of authorities in support of his position (R. 121-122). In response to inquiry by the court, counsel for the Commissioner stated that since the Tax Court was without jurisdiction, his opposition to the motion was based both upon the law and as a matter of policy (R. 129):

The Court: * * *

As I understand it, Respondent does not object to the granting of the motion made to vacate the decisions, but takes the position that the Tax Court is powerless to act, isn't that it? Are you taking the lawful position?

Mr. Ray: No, unfortunately, Your Honor, we do object. Not only do we object on the ground that the Tax Court has no jurisdiction, but we do object because as a matter of policy where the Tax Court has no jurisdiction we cannot become a party to or have any part of granting a motion in circumstances where the Tax Court has no jurisdiction.

At these hearings of September 14 and 16, 1954, the motion to vacate, notwithstanding that the matt was open for full discussion and fully discussed fro all angles (R. 106-133), no suggestion was made taxpayers' behalf that a rehearing was requisite f the purpose of offering additional evidence on t merits. Substantially the only matters brought were what had in fact occurred in the instant case a the extent of the Tax Court's power to extend the ti for filing a petition to review in relief of mistake a inadvertence.

Nevertheless, subsequently on or about October 1954, taxpayers moved for leave to file an amendme to the motion to vacate the decisions out of time, whi was granted. (R. 133-134.) This amendment to t pending motion to vacate the decisions reads as follo (R. 134):

> "Come now the above-named petitioners by the attorney, Robert Ash, and move the Court vaca the decisions entered herein on April 8, 1954, *f the purpose of granting petitioners a rehearing the case on its merits.*
>
> "The statement of facts and supporting a davits in support of this motion are incorporat herein by reference." [Italics supplied.]

The statement of facts, which taxpayers filed in su port of their amended motion on October 11, 1954 (4), suggests that the court should exercise its disc tion and grant the motion to vacate the decisions a order a rehearing for reasons which are itemized und six headings. The first four may be summarized follows:

1. The findings of fact and opinion of the Tax Court were promulgated April 8, 1954.

2. Decisions were entered for respondent on April 8, 1954.

3. The fact that the decisions were entered did not come to the attention of taxpayers until more than three months had elapsed.

4. Copies of the decisions which were mailed to their counsel did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled. Consequently counsel advised taxpayers and others making inquiry on their behalf that the decisions had not been received and this advice was given to taxpayers by their counsel through mistake of fact.

The statement then continues (Appendix B, *infra*):*

> (5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counsel advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19 (e) of the rules of this Court.
>
> (6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evidence which

* The original of this "Statement of Facts," which, though designated as part of the record and for printing, the Tax Court Clerk inadvertently omitted, has now been certified and transmitted and is printed as Appendix B, *infra*.

will show that the opinion and decision of t
Court is wrong on its merits. The evidence wou
show:

(a) That the agreement of May 15, 1940, a
the supplemental agreement of May 15, 19
by which the petitioner sold to Warner Brothe
all his right to the Sergeant York Story a
Warner Brothers agreed to pay petitioner
part of the gross receipts in varying percentag
from the distribution of the photoplay are e
tirely separate and distinct from the emplo
ment contract between petitioner and Warn
Brothers dated May 8, 1940.

(b) The evidence would show in detail that
bona fide dispute existed in 1942 between pe
tioner and Warner Brothers. Additional w
nesses would be produced to establish this i
portant fact.

(c) Evidence would be produced to show th
the sale by petitioners on December 4, 1942,
United Artists Corporation was a bona fide sa
to a third party with no understanding th
United Artists Corporation would resell
Warner Brothers. This evidence would sho
conclusively that United Artists Corporati
was not a mere intermediary in the transactio

(d) The evidence would show in detail t
business purpose behind petitioner's sale
United Artists Corporation on December 4, 194

(e) Upon receipt of this additional eviden
at a rehearing it is petitioner's opinion that t
Court will revise its opinion in accordance wi
the newly-presented facts and hold that the sa

> by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

Thereafter, without any further proceedings, by order dated December 13, 1954, the Tax Court granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

This order of December 13, 1954, recited that it was based on cause shown in the amended motion, lodged October 11, 1954, and in the statement of facts in support thereof (summarized and quoted immediately above).

The Acting Chief Counsel, Internal Revenue Service, thereupon moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decision had become final and the court was without power to grant taxpayers' motion. (R. 136-137.) This motion was denied, as was also a motion for review by the entire Tax Court of the order vacating the decisions. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21, 1955, con-

tinued January 26, 1955). (R. 300-385.) This heari
was exclusively on the merits. Additional testimo
was taken of taxpayer Jesse L. Lasky and of three ad
tional witnesses. At the conclusion of the testimo
Judge Harron outlined in detail the Tax Court's pra
tice with respect to the entering of its decisions (
375-380), proposing an improvement and at the e
stating (R. 380-381):

> I think it is apparent to you why I can't p
> this in an opinion. If I did, the opinion wou
> probably have to be reviewed by the whole cou
> but I think that in this case, for the purposes
> an Appellate Court, this explanation might be he
> ful because it's very hard to find out what our pr
> cedure is like.

The court then said (R. 382-383):

> We have had briefs in this case. I really do
> see the need for the filing of supplemental brie
> You have asked the court to give the matter furth
> consideration of the question that was origina
> presented. The court has heard some additio
> testimony. Briefs have been filed on the matt
> regarding the court giving this matter further co
> sideration, and so unless counsel wish to file su
> plemental briefs I am not going to ask for any.

However, counsel for taxpayers desired the oppo
tunity of filing a brief and counsel for the Comm
sioner stated (R. 383) in response to the court's
quiry as to whether he wished to file a brief:

> Mr. Transue: * * * our position has been th
> there has been no ground for a re-hearing, a

there has been no newly discovered evidence or any other justification for a re-hearing.

Of course, we still maintain our contention that the court is without any jurisdiction to give any further consideration to the matter. If Your Honor permits Mr. Bauersfeld to file a brief I would like to have some period thereafter to consider it and see whether I desire to file one.

In response the court stated (R. 383-384):

On the matter of the continuing objection of the respondent I simply want to say that this seems to be an extraordinary situation and one which merited the exploring of what is involved in the court's own procedure, and I have given you a report on that.

To what extent do you intend to go into your supplemental brief?

Mr. Bauersfeld, this case as you know, was tried before the court by Harrison and Harkins [*sic*] in Los Angeles, and complete briefs have been filed. When I granted a motion for reconsideration I didn't intend in granting that motion to consider the question de novo. Do you understand?

Mr. Bauersfeld: I understand.

The Court: And I believe you prepared the brief, Mr. Bauersfeld, on the matter of whether we could exercise any discretion in the matter of giving this further consideration. Just exactly what do you want to cover in the supplemental brief?

Mr. Bauersfeld: I would like to cover in the supplemental brief only the new evidence as it may affect the prior decision of the court from a factual standpoint.

> The Court: And you don't intend filing a bri
> to reargue the case?
>
> Mr. Bauersfeld: Not the entire case, no, Yo
> Honor.
>
> The Court: I think I will have to make it cle
> that the matter of reconsideration was gone in
> upon the understanding that you had some ne
> evidence to present. The question now is wh
> additional findings of fact should be made and
> what extent the additional evidence may or shou
> be considered in connection with the origin
> briefs. With that understanding you may file
> brief.

By orders and decisions entered on June 30, 19
(R. 138-141, 144-145) the Tax Court stated that it h
concluded after hearing held on taxpayers' motion
vacate the decisions and for rehearing on the meri
(R. 138-139):

> that there existed extraordinary circumstances a
> good cause for granting extraordinary relie
> namely, (1) further hearing on the merits to e
> able the petitioner to present new and addition
> evidence; and (2) reconsideration by the Cou
> of the issue presented to determine whether t
> Court made any erroneous conclusion of fact
> law in its original findings of fact and conclusio
> of law. * * * In order to reconsider the issue
> this proceeding on the merits and to receive furth
> and additional evidence, the Court vacated its
> cision entered on April 8, 1954, received furth
> and additional evidence at a rehearing, and reco
> sidered the issue on the merits.

The orders and decisions continue that on the basis of the entire record in the proceeding, the original evidence and additional evidence adduced at the further hearing, the court was not persuaded that it erred in its original findings of fact and conclusions of law and decided that there were deficiencies in income tax for 1943 in the amounts of $224,515.14 and $224,722.55 against the respective taxpayers Jesse Lasky and Bessie Lasky. (R. 139-141, 144-145.) These are the identical amounts determined in the decisions of April 8, 1954. (R. 92-93.) At the same time when it entered these decisions the Tax Court made additional findings of fact. (R. 141-144.) The petitions for review to this Court are from these decisions entered June 30, 1955. (R. 147.)

Wherefore, it is respectfully requested that this Court enter an order dismissing this appeal for lack of jurisdiction on the ground that petitions for review were not filed within three months after the decisions of the Tax Court were rendered.

CHARLES K. RICE,
Acting Assistant Attorney General.

MARCH, 1956.

NOTICE OF MOTION

To: Robert Ash, Esquire
Attorney for Petitioners
1921 Eye Street, N. W.
Washington, D. C.

Please take notice that the undersigned will bring t
above motion to dismiss on for hearing before t
United States Court of Appeals for the Ninth Circ
at the time and place designated by the Court for t
hearing of the cause on the merits.

CHARLES K. RICE,
Acting Assistant Attorney General.

MARCH, 1956.

In the United States Court of Appeals for the Ninth Circuit

No. 14868

BESSIE LASKY and JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

QUESTION PRESENTED

Whether or not the Tax Court decisions had become final and the limitation period had expired before taxpayers filed petitions for review by this Court.

ARGUMENT

Since Taxpayers Failed to File Petitions for Review Within Three Months After the Tax Court Rendered Its Decisions, This Court Is Without Jurisdiction to Review the Tax Court Decisions

A. *The Tax Court decisions rendered April 8, 1954, have at all times remained in full force and effect and the Tax Court was without power after July 8, 1954, to make the purported order of December 13, 1954, vacating its decisions and granting taxpayers a further hearing on the merits*

The entire scheme of the Internal Revenue Code of 1939 with respect to the jurisdiction of the Tax Court

and review of its decisions is based upon the Congressional direction fixing a specific date upon which a decision of the Tax Court shall become final. This was also the provision of preceding Revenue Acts and has continued without change in the Internal Revenue Code of 1954. Thus, Congress not only fixed a time limitation after which a petition for review by a court of appeals might not be filed (Internal Revenue Code, Section 1142, Appendix A, *infra*) but additionally expressly directed (Internal Revenue Code, Section 1140, Appendix A, *infra*) the time when the Tax Court decision shall become final. As the cases cited below hold, Section 1140 denies to the Tax Court and all courts reviewing its decisions, including the Supreme Court, the jurisdiction to vacate or grant a rehearing with respect to a decision of the Tax Court or its review subsequent to the date specified in Section 1140, when the Tax Court decision shall become final.

Thus Section 1142 provides that a decision of the Board (now the Tax Court) may be reviewed by a Court of Appeals "if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered." In addition, Section 1140 so far as here pertinent reads as follows:

> The decision of the Board shall *become final*—
>
> (a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *. (Italics supplied.)

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[1] References to the Internal Revenue Code are unless otherwise indicated to the Internal Revenue Code of 1939.

The importance of this date, when the Tax Court decision becomes final, is apparent from the frequent references to it in the procedure set up by Congress for the Tax Court and the place of the Tax Court in the determination and assessment of taxes. Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he is prohibited from making an assessment of the deficiency until the expiration of the ninety days, within which taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Board, until the decision of the Board *has become final.*" Section 272(a)(1) (italics supplied). Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Board "*has become final.*" Section 272(b) (Appendix A, *infra;* italics supplied). Again, Section 272(h) (Appendix A, *infra*), specifically provides that "the date on which a decision of the Board *becomes final* shall be determined according to the provisions of section 1140." (Italics supplied.) Indeed, the Committee report, which recommended the adoption of the predecessor of Section 1140, as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, explained (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run

> upon the day upon which the Board's decision be comes final, it is of utmost importance that thi time be specified as accurately as possible. I some instances in order to achieve this result th usual rules of law applicable in court procedur must be changed. For example, the power o the court of review to recall its mandate is made t expire 30 days from the date of issuance of th mandate.

Thus, the statute additionally fixes the time for th running of the limitations on assessment and collec tion, but, in particular, qualifies the inherent power o the courts to reconsider judgments, even during th term in which they are entered.

In litigation affecting the public revenue the nee for certainty and finality is especially evident from th taxpayers' as well as the Government's viewpoint Furthermore, Section 1140 through its limitation o review speeds disposal of income tax controversies. A the Tax Court itself has recognized, it constitutes statute of repose for a tribunal of limited jurisdiction *Rippel & Co.* v. *Commissioner*, 36 B.T.A. 789. At a early date in the history of this tribunal, speaking o the predecesssor of Section 1140 the Supreme Cour in *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716 726-727, sid.

> By § 1005, the decision of the Board is to becom final in respect to all the numerous instances whic in the course of the review may naturally end fur ther litigation. In the provisions of these sections the legislation prescribes minute details for th enforcement of the judgments that are the resul of these petitions for review in the several court

> vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest * * *.

The Supreme Court has held that the authoritative and explicit requirements of Section 1140 deprive even that Court of its otherwise existent jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment during the term in which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Hence, contrary to the view expressed by the Tax Court below (R. 139) it is immaterial, even if correct, that sessions of the Tax Court are not limited by a "term," for the highest authority holds that Section 1140 prevents reconsideration even during the term, once the Tax Court decision under the provisions of Section 1140 has become final.

The courts have repeatedly held that the statute deprives the Tax Court and the reviewing courts of jurisdiction to vacate a decision of the Tax Court or of the reviewing courts and to grant a rehearing (even for good cause shown otherwise warranting the granting of a rehearing) once the period of limitation prescribed by Section 1140 has elapsed and the decision of the Tax Court has become final. This is the holding of the Supreme Court decisions cited above and of the decision of this Court in *Swall* v. *Commissioner*, 122 F. 2d 324, certiorari denied, 314 U.S. 697. This is also the rule enunciated in the following cases: *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5th); *Sweet* v. *Commissioner*, 120 F. 2d 77 (C.A. 1st); *Crews* v. *Commissioner*, 120 F. 2d 749 (C.A. 10th), certiorari

denied, 314 U.S. 664; *Denholm & McKay Co.* v. *Com missioner,* 132 F. 2d 243 (C.A. 1st); *McCarthy* v. *Com missioner,* 139 F. 2d 20 (C.A. 7th); *Monjar* v. *Commis sioner,* 140 F. 2d 263 (C.A. 2d); *White's Will* v. *Com missioner,* 142 F. 2d 746 (C.A. 3d).

This rule has, of course, been applied against th Commissioner as well as against taxpayers. *Helverin* v. *Northern Coal Co., supra; Commissioner* v. *Realt Operators, supra; Denholm & McKay Co.* v. *Commis sioner, supra.*

B. *Ignorance through inadvertence of taxpayers o their counsel of the rendition by the Tax Cour of its decisions was ineffective to confer upon th Tax Court the jurisdiction which Congress ex plicitly had denied, to vacate its decisions afte lapse of the three-month period, and grant a ne hearing on the merits*

Cases like the present one, where the Commissione or the taxpayers have asserted that their failure to see relief within the period prescribed by Sections 1140 an 1142 of the Internal Revenue Code has been due t failure to receive notice of the Tax Court's decision o because of reliance upon counsel, nevertheless have re sulted in rulings that the Tax Court was without juris diction over its decision after it had become final unde the statute; similarly the courts of appeal are held fo the same reason without jurisdiction to review decision of the Tax Court after the prescribed statutory perio has expired. *Commissioner* v. *Realty Operators, supra Swall* v. *Commissioner, supra; McCarthy* v. *Commis sioner, supra; Monjar* v. *Commissioner, supra.*

As the facts stated in support of the motion show

supra, a copy of each of the decisions of April 8, 1954, actually was served by registered mail upon the first counsel of record for the taxpayers, although unfortunately this did not actually come to the attention of the attorneys in charge at that office or their associates until after the expiration of the three-months period. (R. 102-103, 114.) Apparently it is the practice of the Tax Court to serve copies of decisions and under its rules where a party is represented by more than one counsel service is made only upon counsel whose appearance was first entered of record.[2] However, no explanation appears for the failure of counsel or associate counsel to recognize from the explicit direction in the opinion that "Decisions will be entered for the respondent" (R. 92), that the decisions would be entered forthwith and no computation under Rule 50 was requisite. Indeed, since the opinion also expressly declared (R. 92) that "The respondent's determination is sustained," it was further apparent that the Commissioner's determination, as stated in the deficiency notice, was sustained, and no further computation was necessary. Entry of the decisions under this opinion on its face submittedly was a *pro forma* matter.

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[2] Rules of Practice before the Tax Court (Rev. Nov. 1952):

RULE 22.—SERVICE

* * * * *

(b) *Upon first counsel of record.*—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

The Tax Court judge made some suggestions for improvement of this practice (R. 378-381), but these cannot, of course, affect the result here.

In particular, it is significant that counsel made inquiry of the Tax Court about the status of the p ceeding literally for months until July 20, 1954, a after the expiration of the three-months period. (102, 104-105.) The present counsel for taxpayers a mitted at the hearing on the motion to vacate, in sponse to question by the Tax Court judge, that he w unable to explain why the Clerk of the Tax Court h not previously been asked about the entry of the de sions. (R. 126-128.)

In any event, the statute nowhere requires service decisions of the Tax Court upon counsel. Nor d it make limitation of the time for filing petition for view or for fixing the date of finality of the Tax Co decision depend at all upon service of a decision or tice to taxpayer or his counsel of entry of decisi Section 1142 confers jurisdiction to review a Tax Co decision by a Court of Appeals, if a petition for s review is filed by either the Commissioner or taxpay "within three months after the decision is *rendered*. (Italics supplied.) Section 1140, prescribing when T Court decision becomes final, insofar as here pertine provides that the decision shall become final upon "t expiration of the time allowed for filing a petition f review, if no such petition has been duly filed with such time * * *." Notwithstanding the apparent pra tice of the Tax Court to serve the first counsel of reco with a copy of a decision and the circumstance that a matter of fact such service actually here occurred, t limitation on time for review is in no sense condition

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[3] A decision is "held to be rendered upon the date that an or specifying the amount of the deficiency is entered" (Sect 1117(c), Appendix A, *infra*), here April 8, 1954. (R. 92-93.)

upon such service or notice to counsel, but the statute clearly fixes the date from the actual rendition of the decision.

Surely it is plain that the failure by taxpayers to realize that the time to file petitions for review was running was here due to no fault of the Tax Court or the Commissioner. See *McCarthy* v. *Commissioner, supra,* p. 21. As already noted in like regrettable situations the limitation statute has been held binding upon the Commissioner. Had the tables been turned and the Commissioner sought under similar circumstances to vacate the Tax Court decisions and for a new hearing after the expiration of the time limited by Sections 1140 and 1142, and had the Tax Court granted such an application and the Commissioner then sought to review the Tax Court's decision on rehearing, to adopt the language of the First Circuit in *Commissioner* v. *Sweet, supra,* p. 82, "In such an eventuality the taxpayer's cry of dismay would be loud and long, and not without reason."

C. *No extraordinary circumstances appear on this record, such as warranted the Tax Court to vacate its decisions of April 8, 1954, and order a rehearing on the merits, assuming that tribunal possessed jurisdiction similar to that of a court to grant a writ of error coram nobis*

The Tax Court below vacated the April 8 decisions "for the purpose of granting petitioners a further hearing on the merits" (R. 135), by its order dated December 13, 1954, and by the same order set the case down for hearing. After having held the hearing in January, 1955, and heard additional testimony the Tax Court en-

tered its orders and decisions on June 30, 1955 (R. 138 141, 144-145) in which it concluded that it had not erred in its original decisions and also explained that it had earlier vacated these decisions because (R. 138-139)—

> The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. *LaFloridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630; *United States* v. *Morgan,* 346 U. S. 502; *United States* vs *Mayer,* 235 U. S. 55; *Wayne United Gas Co.* vs *Owens-Illinois Glass Co.,* 300 U. S. 131; Rule 60(b) Federal Rules of Civil Procedure; *Reo Motors, Inc* vs. *Commissioner,* 219 F. 2d 610. In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954 received further and additional evidence at a rehearing, and reconsidered the issue on the merits

Most of the authorities cited relate to the jurisdiction of a court to issue a writ of error *coram nobis;* they are plainly distinguishable from the present record since no such extraordinary circumstances are here present which possibly could warrant the exercise of jurisdiction to grant a writ of error *coram nobis.* Thus in *Reo Motors* v. *Commissioner,* 219 F. 2d 610 (C.A 6th), the facts were that the Commissioner and taxpayer had stipulated that the Commissioner's computation of

taxpayer's excess profits credit was correct and in its application there for extraordinary relief taxpayer alleged (p. 611) that—

> because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; * * *

The Sixth Circuit held only that the Tax Court has power in extraordinary circumstances to vacate and correct its decision, even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis;* the court expressed no view as to whether the circumstances in the cited case were so extraordinary as to invite the exercise of that discretion. Whether or not the cited case was correctly decided—and we think it was not, in view of the provisions of Section 1140 of the Internal Revenue Code and of the decisions of the Supreme Court in the *Northern Coal Co.* and *Simpson & Co.* cases and of the other courts above cited—in any event the circumstances there of mutual mistake of fact in entering into a stipulation, upon which the decision of the Tax Court had allegedly been based, were certainly entirely different from the record facts.

Indeed, in the *Reo Motors* case the taxpayer additionally alleged (p. 611):

> that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942 under § 722

> of the Internal Revenue Code of 1939, 26 U.S.C.
> § 722, in response to which the Commissioner ha
> contended that no § 722 relief could be given becau
> the allowance of the petitioner's proper credi
> would result in no excess profits tax liability for th
> year 1942, making inapplicable the relief prov
> sions of § 722.

Moreover, in its opinion the Sixth Circuit quoted fro
a letter from the Commissioner supporting this alleg
tion. (P. 611, fn. 1). Further the court there note
(p. 612) that—

> The petitioner points out that the Commissione
> not only concedes this factual error, but is seekin
> to take advantage of it to the detriment of the p
> titioner in resisting petitioner's claim under § 72

This consideration may well have affected the court
decision there. By contrast here the Commissioner wa
not at all at fault and was in no sense a party to th
error or inadvertence. Submittedly the *Reo Motor*
case constitutes no authority for the Tax Court's orde
here. [4]

United States v. *Morgan*, 346 U.S. 502, and *United*
States v. *Mayer*, 235 U.S. 55, which discuss the circum
stances under which a writ of error *coram nobis* m
granted, again plainly show that no such extraordinar

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[4] Nevertheless the Sixth Circuit's decision in *Reo Motors*, date
February 23, 1955, is cited instantly in the Tax Court's subsequen
order and decision of June 30, 1955. (R. 138.) However, th
Tax Court's order here dated December 13, 1954 (R. 135), orig
inally vacating the decisions of April 8, 1954, was cited to th
Sixth Circuit and is the decision intended to be referred to in i
opinion (p. 612) (although the citation there given (22 T.C. 13
is actually to the official report of the original findings and opinio
of the Tax Court (R. 62-92)).

situation whatsoever is present in the instant record.[5] By contrast all that the Tax Court here asserted as the ground for exercise of power to grant "extraordinary relief" (R. 138) was "to enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue, to determine whether it had made any erroneous findings or legal conclusions. These bore no resemblance to possible errors, which went to the regularity of the proceeding itself, such as in a criminal case the failure without competent waiver to furnish the defendant with counsel, or that the defendant being under age appeared by attorney, such as justify the grant of *coram nobis*.

Furthermore, the nature of the additional evidence proffered by taxpayers here is shown in their statement of facts in support of the amended motion (Appendix B, *infra*) and upon the basis of which the Tax Court expressly acted in granting its order of December 13, 1954. (R. 135.) See also summary of the additional testimony made by the court in its order and decision of June 30, 1955 (R. 139-141) and its memorandum sur order and decision (R. 141-144). Submittedly the showing made to the Tax Court was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—since the evidence offered was merely cumulative and it was

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[5] Thus with reference to such writs in the *Mayer* case, the Supreme Court said (p. 69):

> This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.

See also *United States* v. *Morgan, supra,* p. 507, fn. 9.

not such as by due diligence could not have been ad
duced at the original hearing. Surely, in any event i
presented no cause for granting extraordinary relief i
the nature of writ of error *coram nobis.*

The record on appeal in the *Swall* case, *supra,* wher
this Court held in the light of the *Northern Coal Co*
case, the Board should have dismissed the proceedin
for want of jurisdiction, shows that the taxpayer ther
also moved for a writ of *coram nobis.* Docket No. 9758
Moreover in the *Swall* case, p. 325, this Court con
sidered that the Fifth Circuit's decision in *LaFlor*
dienne J. Buttgenbach & Co. v. *Commissioner,* 63 F. 2
630, cited by the Tax Court (R. 138), has in effect bee
overruled by the *Northern Coal Co.* case, and the Su
preme Court denied certiorari in the *Swall* case. Th
Buttgenbach case has also been questioned or distin
guished by the First Circuit in the *Sweet* case, *supr*
p. 81, the Second Circuit in the *Monjar* case, *supr*
p. 265, and the Third Circuit in the case of *White'*
Will, supra, pp. 748, 749. In any event on its facts th
Buttgenbach case is readily distinguishable from th
instant record, since the order of the Board there va
cated was not really a judgment of the Board but wa
based on a stipulation and the Board itself had neve
ascertained what if any taxes were owed. Both partie
were agreeable to setting aside the stipulation, an
the Fifth Circuit declared (p. 631):

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[6] There the grounds, upon which taxpayer relied in vain as justi
fication for vacating the earlier decision, were that the taxpayer
representative before the then Board of Tax Appeals had not bee
admitted to practice and that he had fraudulently induced taxpaye
to dismiss the proceeding for his own personal gain. Lack o
jurisdiction in the Tax Court to vacate its decisions of April 8
1954, here certainly follows *a fortiorari.*

> We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown.

Finally, as the Supreme Court pointed out in *Wayne Gas Co.* v. *Owens Co.,* 300 U.S. 131, 137, "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal] the appeal must be dismissed."[7] This statement by the Supreme Court was quoted in the *Realty Operators Co.* case, *supra,* p. 289, and applied by the Fifth Circuit against the Commissioner and his petition for review was dismissed, when based upon a Board order which had vacated its previous decision. This principle plainly possesses instant application. Taxpayers' original motion was simply to vacate the decisions entered on April 8, 1954. (R. 94.) At the full hearing, which was held on this motion on September 14 and 16, 1954 (R. 106-133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed was the circumstances under which the time to file petitions for review had been permitted to lapse. Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court vacate the April decisions for the purpose of granting taxpayers

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[7] Moreover, the holding in the cited *Wayne Gas Co.* case that a bankruptcy court in a reorganization proceeding has power in its sound discretion to reopen an order dismissing the reorganization petition, notwithstanding that the time allowed for appeal from the order has expired, is without instant application. The reasoning of the court (p. 137) shows that the rule would have been different, if the statute there had contained a provision similar to Internal Revenue Code Section 1140, as, indeed, its decisions in the *Northern Coal Co.* and *Simpson & Co.* cases demonstrate.

a rehearing on the merits and the statement of fac
above referred to was filed. (R. 133-134.) As alread
pointed out the additional testimony was merely cum
lative, including testimony from taxpayers' own a
countant and more testimony from taxpayer Jes
Lasky, and was not shown to be newly discovered.

If taxpayers believed that the justice of their cau
required the receipt of additional evidence on th
merits, which was the nominal reason for vacating th
decisions and for the rehearing, it is not explained wh
they waited for approximately six months after r
ceiving the Tax Court's findings and opinion befo
even suggesting to the Tax Court the need for a rehea
ing; nor is it explained why in the original motion
vacate and in the course of the discussion at the hea
ing on that motion no relief by way of adducing add
tional evidence on the merits was applied for or i
necessity explained. The subject of discussion on th
contrary was taxpayers' failure to appeal in tim
There was no requirement that taxpayers await th
Tax Court's decisions before moving for rehearing,
in fact the alleged extraordinary need existed, for a
ducing additional evidence. Indeed, the Tax Court
rules contemplate that such a motion for further hea
ing be filed within thirty days after the *opinion* ha
been served. (Rule 19(e).) Again, at the conferen
held on April 14, 1954, attended by taxpayer, Jes
Lasky, and his attorneys, who had conducted the tria
there was no intimation of a great and extraordinar
need to adduce additional evidence; the further actio
contemplated in the light of the Tax Court's opinio
was apparently appeal or compromise. (R. 96, 99, 10
102, 103-104.) The inference seems compelling tha

the October 11, 1954, amendment to the motion to vacate "for the purpose of granting petitioners a rehearing of the case on its merits" (R. 134) was an afterthought for the purpose of extending the time for appeal.

The Federal Rules of Civil Procedure do not apply to Tax Court proceedings.[8] In any event Rule 60(b), cited by the Tax Court in its order and decision of June 30, 1955 (R. 138), does no more at the most than authorize relief by motion or otherwise similar to that formerly granted by the abolished writ of *coram nobis* and, as already discussed the present record presents no occasion for the exercise of jurisdiction in the nature of *coram nobis*.

Submittedly, the prescription of Section 1140 of the Code made final the April 8, 1954, decisions of the Tax Court here and no jurisdiction analogous to writs of *coram nobis* is possesed by the Tax Court. But assuming *arguendo* that the Tax Court possesses jurisdiction analogous to that of a writ of error *coram nobis*, the present record presented no occasion whatsoever for the exercise of such extraordinary relief and the direction of Section 1140 prevented the Tax Court from vacating its April 8, 1954, decisions here.

CONCLUSION

Since these decisions of April 8, 1954, remained at all times in effect and the order of the Tax Court purporting to vacate them was erroneously granted without jurisdiction, the petitions for review by this Court were filed too late and the Commissioner's motion to dismiss

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[8] *Katz* v. *Commissioner*, 188 F. 2d 957 (C.A. 2d); 7 Moore's Federal Practice (2d ed.) 4433.

the petitions for review for lack of jurisdiction shou
be granted.

Respectfully submitted,

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I. HENRY KUTZ,
Attorneys,
Department of Justice,
Washington 25, D. C.

MARCH, 1956.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(b)[9] *Collection of Deficiency Found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h)[10] *Final Decisions of Board.*—For the purposes of this chapter the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1140.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

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[9] Internal Revenue Code of 1954, Section 6215(a), is substantially identical.

[10] Internal Revenue Code of 1954, Section 6214(c) reads as follows:

Final Decisions of Tax Court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

SEC. 1117.[11] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proce
ing instituted before the Board and a decis
thereon shall be made as quickly as practical
The decision shall be made by a member in acco
ance with the report of the Board, and such decis
so made shall, when entered, be the decision of
Board.

(b) *Inclusion of Findings of Fact or Opini*
in Report.—It shall be the duty of the Board a
of each division to include in its report upon a
proceeding its findings of fact or opinion or me
orandum opinion, the Board shall report in writ
all its findings of fact, opinions and memorand
opinions.

(c) *Date of Decision.*—A decision of the Bo
(except a decision dismissing a proceeding
lack of jurisdiction) shall be held to be rende
upon the date that an order specifying the amo
of the deficiency is entered in the records of
Board. If the Board dismisses a proceeding
reasons other than lack of jurisdiction and is una
from the record to determine the amount of
deficiency determined by the Commissioner, o
the Board dismisses a proceeding for lack of ju
diction, an order to that effect shall be entered
the records of the Board, and the decision of
Board shall be held to be rendered upon the d
of such entry.

* * * * *

(26 U.S.C. 1952 ed., Sec. 1117.)

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[11] Internal Revenue Code of 1954, Section 7459(a), (b) and
is substantially identical.

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a)[12] *Petition for Review Not Filed On Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U.S.C. 1952 ed., Sec. 1142.)

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[12] Internal Revenue Code of 1954, Section 7481(1) is substantially identical.

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be review
by a United States Court of Appeals as provid
in section 7482 if a petition for such review is fil
by either the Secretary (or his delegate) or t
taxpayer within 3 months after the decision
rendered. * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7483.)

CERTIFICATE OF SERVICE

Service of copy of the within papers consisting
motion, notice of motion and brief in support of moti
to dismiss for lack of jurisdiction was made by mail t
day of March, 1956, on Robert Ash, Esqui
Attorney for Petitioners, addressed to his office, 19
Eye Street, N. W., Washington 6, D. C.

CHARLES K. RICE,
~~Acting~~ Assistant Attorney General,
Department of Justice,
Washington 25, D. C.,
Attorney for Respondent.

APPENDIX B

THE TAX COURT OF THE UNITED STATES

Docket Nos. 26396 and 26397

BESSIE LASKY and JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

STATEMENT OF FACTS IN SUPPORT OF MOTION TO VACATE DECISIONS AND FOR REHEARING

On August 24, 1954, petitioners filed a motion for leave to file motion to vacate decisions out of time. This motion was granted by the Court on August 26, 1954, and a hearing was held on the motion to vacate decisions on September 14, 1954. The motion to vacate the decisions stated that a statement of facts and supporting affidavits would be filed in the near future. The supporting affidavits were filed on September 10, 1954. This statement of facts is filed in accordance with the motion to vacate decisions for purpose of granting petitioners a rehearing of the case on the merits. The Court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing for the following reasons:

(1) The findings of fact and opinion of the Tax Court in the above-entitled case were promulgated April 8, 1954.

(2) Decisions were entered for respondent on April 8, 1954.

(3) As shown by the affidavits heretofore filed, in this case on September 10, 1954, the fact that the decisions were entered did not come to the attention of the petitioners until more than three months elapsed after they were entered.

(4) Copies of the decisions which were mailed
counsel for petitioners did not actually come to co
sel's attention upon their receipt as they were inadv
tently misfiled. Consequently, on numerous occasi
petitioners and other persons making inquiry on th
behalf, were advised by their counsel that the decisi
had not been received. This advice was given to p
tioners by their counsel through mistake of fact.

(5) Because petitioners had no knowledge that
decisions had been entered on April 8, 1954, and
cause their counsel advised them affirmatively upon
quiry that the decisions had not been entered, throu
no fault or negligence of the petitioners they did not
this motion to vacate the decisions within the time
lowed by Rule 19(e) of the rules of this Court.

(6) In view of the foregoing, good cause exists wh
justifies the Court in vacating the decisions heretof
entered on April 8, 1954, for the purpose of granti
petitioner a rehearing of the case on its merits. A
rehearing of the case the petitioner would present ad
tional evidence which will show that the opinion a
decision of the Court is wrong on its merits. The e
dence would show:

(a) That the agreement of May 15, 1940, a
the supplemental agreement of May 15, 1940,
which the petitioner sold to Warner Brothers
his right to the Sergeant York Story and War
Brothers agreed to pay petitioner a part of
gross receipts in varying percentages from the
tribution of the photoplay are entirely separ
and distinct from the employment contract betw
petitioner and Warner Brothers dated May 8, 19

(b) The evidence would show in detail tha
bona fide dispute existed in 1942 between petitio
and Warner Brothers. Additional witnesses wo
be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

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T.C. U.S. filed October 11, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 379172 1167

No. 14868

In the United States Court of Appeals for the Ninth Circuit

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED
MAR 23 1956
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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 62-92) rendered after the original hearing is reported at 22 T. C. 13; the memorandum opinion of the Tax Court after rehearing (R. 138-144) is not reported.

JURISDICTION

The Commissioner contends that this Court is without jurisdiction to decide the instant consolidated cases inasmuch as taxpayers failed to file petitions for review within three months after the Tax Court decisions were rendered. The facts upon which the Commissioner's contention is based and the reasons in support of it are

fully set forth in his motion to dismiss for lack of juris diction and brief in support of the motion printe under separate cover. *Accordingly, only alternativel and in the event that this Court disagrees with the Com missioner's contention with respect to jurisdiction an denies his motion to dismiss for lack of jurisdiction i consideration of the within brief on the merits re quested, or does it become pertinent.*

The Commissioner under date of November 28, 1949 determined deficiencies in income tax for the year 194 in the case of Bessie Lasky in the amount of $224, 722.55 and in the case of Jesse L. Lasky in the amoun of $224,515.14. (R. 10-14, 62, 158.) Within ninet days thereafter and on January 9, 1950, each of th taxpayers filed a petition with the Tax Court for re determination of the deficiency under the provision of Section 272 of the Internal Revenue Code of 1939 (R. 1, 14.) The final order and decision of the Ta Court was rendered in each case on April 8, 1954 (R 92-93), determining deficiencies in income tax due fro taxpayer Bessie Lasky for 1943 in the amount of $224, 722.55 and in the case of Jessie L. Lasky for 1943 i the amount of $224,515.14.

Under date of August 24, 1954, taxpayers moved th Tax Court to vacate the decisions entered on April 8 1954 (R. 94), and on October 11, 1954, taxpayers move to amend the motion to vacate the decisions of Apri 8, 1954, by in substance adding "for the purpose o granting petitioners a rehearing of the case on its merits" (R. 134). By an order dated December 13 1954, which for reasons stated in the Commissioner's motion to dismiss for lack of jurisdiction, the Commis sioner contends was erroneously made, the Tax Court granted taxpayers' amended motion and ordered tha

its decision in each of the two above-entitled cases entered on April 8, 1954, be vacated and set aside for the purpose of granting taxpayers a further hearing on the merits. (R. 135.) Under date of June 30, 1955, the Tax Court made its order and decision in each of the above-entitled cases (R. 138-141, 144-145) after rehearing, adhering to its original opinion and decision, and determining deficiencies in the same amounts, as determined in its orignal decisions of April 8, 1954, namely, in the case of taxpayer Jesse L. Lasky, $224,515.14 (R. 141) and in the case of Bessie Lasky in the amount of $224,722.55 (R. 144-145). The Commissioner contends in his said motion that the Tax Court was without jurisdiction to render these decisions of June 30, 1955.

Taxpayers seek to bring the case to this Court by petitions for review filed on August 10, 1955 (R. 6, 145-149), which the Commissioner contends were not duly filed pursuant to the provisions of Section 1142 of the Internal Revenue Code of 1939 and Section 7483 of the Internal Revenue Code of 1954 within three months after the Tax Court's decisions were rendered and that therefore these petitions are insufficient to confer jurisdiction upon this Court to hear the instant case. Only in the event that this Court overrules the Commissioner's motion to dismiss and holds that the Tax Court possessed jurisdiction to vacate its decisions of April 8, 1954, and to enter the purported decisions on rehearing of June 30, 1955, would the petitions for review be timely under the statute.

QUESTION PRESENTED

Whether on the record facts the Tax Court was clearly wrong in concluding that the sum of $805,000,

which taxpayer Jesse L. Lasky received in 1942, was ordinary income and not capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid or from professions, vocations, trades, businesses commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Sec. 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would

properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

(2) [As amended by Sec. 150(a) of the Revenue Act of 1942, *supra*] *Short-term capital gain.* —The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(4) [As amended by Sec. 150(a) of the Revenue Act of 1942, *supra*] Long-term capital gain. —The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

Taxpayers are husband and wife, whose income in 1942 and 1943 was community income, reported on the cash basis. (R. 62-63.) Their cases were consolidated in the Tax Court (R. 151) and by order of this Court (R. 455-456) are consolidated here. Unless otherwise noted taxpayer-husband, Jesse L. Lasky, will be referred to as taxpayer.

The Commissioner determined deficiencies in income tax for 1943 as follows (R. 62):

Bessie Lasky	$224,722.55
Jesse L. Lasky	224,515.14

The year 1942 is involved because of the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126. (R. 62.)

Based on the testimony of witnesses adduced at a hearing held on December 10-11, 1951 (R. 2, 150-299), and rehearing held January 21 and 26, 1955 (R. 5, 300-385), a stipulation of facts (R. 19-23), and documentary evidence, the Tax Court made the following fact findings:

Taxpayer's occupation has been that of a motion picture producer since 1913, and he has produced many pictures. He has been a producer for various corporations in which he was an officer such as Jesse L. Lasky Star Players Company, Famous Players-Lasky Company, Paramount Famous-Lasky Company, R.K.O., Fox Film Corporation, and Pickford-Lasky Corporation. (R. 63.)

Taxpayer was the producer of a radio show called "Gateway to Hollywood" from 1938 to the early part of 1940. For three months in the early part of 1940,

taxpayer was not associated with or engaged in any production, and he was not associated with any corporation. (R. 63.)

Prior to March, 1940, Lasky, as an individual, had not purchased any literary property, but as vice-president in charge of production of Paramount, many literary properties passed through his hands. When he was an officer of Jesse L. Lasky Star Players Company, and when he was in charge of production of Famous Players-Lasky Company he became acquainted with the procedures followed by those companies in purchasing plays, stories, and literary properties. (R. 63.)

In the early part of 1940, in Jamestown, Tennessee, taxpayer negotiated with Alvin York, a hero of World War I, for the purchase of the motion picture and other rights in the life story of Alvin York. On March 23, 1940, York and Lasky entered into a written agreement (Ex. 1-A, R. 23-38) under whose terms York sold to Lasky, inter alia, the exclusive motion picture rights in the story of Sergeant York, and, in particular, in three published books, "Sergeant York and His People", "Sergeant York, Last of Long Hunters", and "The War Diary of Sergeant York". In consideration for all the rights received, Lasky agreed to pay York $25,000 upon the execution of the agreement, and $25,000 at the expiration of either 18 months from the date of the execution of the agreement, or upon the date following the release of any motion picture made pursuant to the agreement, whichever date was earlier. Failure to pay the second $25,000 would result in termination of the agreement. In addition, Lasky agreed to pay York a sum equal to 4% of gross receipts from the distribution of each motion picture in excess of $3,000,000; 5%, in excess of $4,000,000; 6%, in excess of $6,000,000; and

8%, in excess of $9,000,000. It was expressly provide that if the contract should be assigned to a productio or distribution corporation the assignee would assum all of Lasky's obligations. Lasky paid York $25,00 upon the execution of the agreement. He borrowed th funds used to make the payment. (R. 63-64.)

Taxpayer, thereafter, flew to Hollywood, California where he arrived on about March 25, 1940. Lask shopped around to sell the story for production of motion picture. He had an outline of a story which h gave Sam Goldwyn to read. He called on Paramoun also. None of the first contacts wanted the story. H then called on Harry and Jack Warner of Warne Brothers Pictures, Inc. Warner Brothers agreed t purchase the rights to the story of Sergeant York an to employ Lasky as the supervising producer. The un derstanding of Warner Brothers and Lasky was reache a few weeks before written instruments were ready fo execution. The agreements executed and the date thereof were as follows: (1) One agreement was date May 8, 1940, by which Warner Brothers employed Lask as the supervising producer of a photoplay tentatively entitled "The Amazing Story of Sergeant York". (Ex D, R. 385-408.) (2) Another agreement was dated Ma 15, 1940, by which Lasky sold to Warner Brothers al of his rights to the York story and all other rights h had acquired under the York contract of March 2 1940. (Ex. 2, R. 38-41.) Another agreement was simul taneously executed, entitled "Supplemental Agree ment", which was dated May 15, 1940, by which Warne Brothers agreed to pay Lasky part of the gross receipts in varying percentages, from the distribution of th photoplay, "The Amazing Story of Sergeant York" (Ex. 3, R. 41-47) (R. 64-65.)

The agreement of May 8, 1940, was for an original term of 52 weeks beginning, retroactively, on April 1, 1940, with options to extend the period of the agreement for a maxmium period of seven years. The agreement provided, inter alia, as follows (R. 65-66):

> 13. It is understood that the Company has purchased from the Producer, all Producer's rights to, in and under certain agreement dated March 23, 1940, between the Producer and Alvin C. York, the original of which contract has been delivered to the Company, and which rights are of value in connection with the production of the proposed photoplay, "The Amazing Story of Sergeant York", referred to in Paragraph 3 hereof. The Company shall be entitled to the services of Producer in the preparation and/or writing of the script upon which said motion picture photoplay shall be based, but it is not a condition or prerequisite to the production of said photoplay that said script shall be approved by Producer, and on the contrary Producer agrees to render his services in the complete production of said photoplay provided only said script meets with the approval of the Company. It is further understood that Producer shall work under the direct supervision of Jack L. Warner and Hal B. Wallis, or either of them, provided either of them remain in the employ of the Company during the term hereof; * * *.
>
> 14. It is further agreed that Producer shall be accorded credit on the film of the photoplay produced hereunder and in all paid advertising and publicity issued by and under the direct control of the Company in approximately the following form,

to-wit: "Produced by Jesse L. Lasky and Hal B. Wallis."

In general, the agreement provided that Lasky would render services as the supervising producer of the York photoplay, and such other photoplay as might be selected by mutual consent, for a period of 52 weeks from April 1, 1940; that Lasky, at the option of Warner Brothers, would render additional services in connection with the preparation or writing of the script, and editing, supervising, and overseeing the development of the screen play; and that Lasky would receive for all of his services under the contract at least $60,000 payable at the rate of $1,500 per week. (R. 66-67.)

Under the agreements of May 15, 1940, Warner Brothers, in general, agreed to pay Lasky $40,000 for all of his right, title, and interest in the York agreement of March 23, 1940, plus a part of the gross receipts from domestic and foreign distribution during not more than five years after the date of release of the York photoplay. Warner Brothers assumed all of Lasky's obligations under the York contract. (R. 67.) The so-called "Supplemental Agreement" provided, in part, as follows (R. 67-68):

> Whereas, the parties hereto have simultaneously herewith entered into a contract whereby Warners have purchased all the right, title and interest of Lasky in and under a certain contract between Lasky and Alvin C. York, dated March 23, 1940, relating to a motion picture tentatively entitled, "The Amazing Story of Sergeant York", as in said contract set forth,
>
> Now, therefore, it is further agreed that as an additional compensation and consideration payable

to Lasky by Warners for the rights contained in the aforesaid contract Warners will pay to Lasky a further sum based upon the gross returns from the release and/or distribution and/or exhibition of the said photoplay, as follows: * * *

2. Warners will pay Lasky a sum equal to twenty per cent (20%) of the gross film rentals or sales (as hereinafter defined) realized from such motion picture in excess of the sums hereinafter stated. The term "gross film rentals or sales", as used herein, shall be deemed to be the aggregate of the domestic proceeds and the foreign proceeds realized from the sale, rental or distribution of the photoplay contemplated hereunder. * * * Warners will pay Lasky the said sum of twenty per cent (20%) upon the said domestic proceeds in excess of One Million Six Hundred Thousand Dollars ($1,600,000.00) and a similar percentage of the foreign proceeds in excess of One Hundred and Fifty Thousand Dollars ($150,000.00); * * * It is further understood that should the aggregate proceeds, both domestic and foreign, reach the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00), then thereafter Warners will pay Lasky a sum equal to twenty-five per cent (25%) of the excess above such figure instead of twenty per cent (20%) as is herein provided for proceeds below such figure.

Warner Brothers agreed, also, to keep complete books of account pertaining to receipts from the distribution of the photoplay, and to make such records available at all times to Lasky or his agents. Warner Brothers

agreed to render periodical statements to Lasky after the release of the picture, not less than once each quarter, accounting for receipts, and to make simultaneous payment to Lasky of his share of the gross receipts shown by each statment. (R. 68-69.)

The so-called "Supplemental Agreement" of May 15, 1940, is the type of agreement which is known as a participation agreement. (R. 69.)

Warner Brothers paid $40,000 to Lasky in 1940, as provided in the agreement of May 15, 1940. Warner Brothers reported the payment of $40,000, on Form 1099 of the Treasury Department as a payment for "Sale of Story". (R. 69.)

Lasky went on Warner Brothers' payroll as of April 4, 1940. He was paid $58,500 during 1944 for his services as a producer during 39 weeks. Warner Brothers reported payment of $58,500 as "salary" on Form 1099. (R. 69.)

Lasky reported the sums of $40,000 and $58,500 as ordinary income in his income tax return for 1940. (R. 69.)

A photoplay entitled "Sergeant York" was produced; it was released in the United States and Canada in July, 1941. (R. 69.)

Lasky's employment as a producer of the photoplay extended over 58½ weeks, from April 4, 1940, to May 17, 1941. Lasky was paid $87,750 for his services at the rate of $1,500 per week. (R. 69.)

Lasky was employed by Warners Brothers in the production of other pictures during 1941, 1942, 1943, and 1944. He went back on the payroll on May 19 1941, in connection with a photoplay about Mark Twain. He worked on that project intermittently until Jan-

uary 9, 1943, for a period of 77 weeks, receiving total compensation of $126,175, for his services as an associate producer. From January 11, 1943, until April 24, 1944, Lasky worked for Warner Brothers during 83 weeks on "various" projects receiving $150,516.67 for his services as an associate producer. (R. 69-70.)

Warner Brothers followed the practice of mailing statements to Lasky which were designated "Statement to Jesse L. Lasky covering distribution of production 'Sergeant York' to (date)," together with a check for the amount of Lasky's participating share as shown by the statement. Lasky's share was 20%, at first, under the agreement. The first of such statements was mailed to Lasky with a letter dated December 15, 1941. The statement was for the period ending November 29, 1941, and showed the following (R. 70):

Gross income from distribution within U.S.	$1,706,084.02
Less—gross rentals (U.S.) in which participant does not share	1,600,000.00
Net on which participant shares	$ 106,084.02
Participant's share—20%	$ 21,216.80

Lasky received a check for $21,216.80 with this statement. (R. 70.)

An account was set up on the books of Warner Brothers entitled "Income from Distribution of Production 'Sergeant York' and Jesse L. Lasky's Share Thereof". This account showed gross receipts from domestic and foreign distribution. The account was periodically credited with Lasky's share of gross receipts pursuant to the "Supplemental Agreement" of May 15, 1940. The account showed the total amount of credits before a new crediting of his share, the

amount of his participating share as of a particular date, and the total "to date". It also showed certain charges against Lasky's account. A record was kept of the checks of Warner Brothers which were made payable to Lasky, and the amounts thereof. (R. 70-71.)

At the end of 1941, Lasky made two separate requests to Warner Brothers to make advances to him of his 20% share of gross receipts. His first request was for an advance payment of $85,000, and his second request was for an advance payment of $90,000, a total amount of $175,000. Warner Brothers made the payments requested by check. (R. 71.)

In 1941, Lasky received $196,216.80 from the gross receipts from the distribution of the York picture which he reported in his return for 1941 as ordinary income ($21,216.80, plus $175,000). (R. 71.)

As consideration for the two advance payments in 1941 of $175,000, Lasky agreed to modifications of the "Supplemental Agreement" of May 15, 1940. The amendments were made by letters of Warner Brothers to Lasky, which he signed as "Accepted", dated December 30, 1941 (Ex. 4, R. 48-51), and December 31, 1941 (Ex. 5, R. 51-54). (R. 71).

As consideration for the advance payments of $175,000, Lasky agreed that he would begin to share in the earnings of "Sergeant York" after the gross film rentals reached $2,580,000 instead of $1,600,000, as previously agreed. If Lasky had waited to receive the 20% first agreed upon, his share would have been $196,000. Therefore, the receipt of the advance payments of $175,000 represented a discount of the first $196,000 of earnings for $21,000. Lasky gave Warner Brothers a discount in order to receive payments in 1941 in advance. (R. 74-75.)

By another "letter agreement" dated April 30, 1942 (Ex. 6, R. 55-56), Lasky agreed to pay (and he authorized Warner Brothers to withhold and keep from any sums due him under the Supplemental Agreement of May 15, 1940, as amended) the sum of $18,998 to be expended by Warner Brothers in an advertising campaign of the picture "Sergeant York". This sum was withheld by Warner Brothers prior to December 4, 1942. (R. 75-76.)

At some time prior to May 1942, a claim based upon alleged plagiarism was lodged against Warner Brothers and Lasky by the heirs of Skeyhill, the author of "Sergeant York, Last of Long Hunters". Warner Brothers tentatively debited taxpayer's account on its books in the amount of $10,000 as a safeguard against possible costs arising out of such claim. Of this debit, all but $239.75 was ultimately recredited to taxpayer's account. (R. 76.)

On about May 6, 1942, Lasky instructed Warner Brothers to send future statements of account and participation checks, and other matters directly to his attorney. (R. 76.)

Lasky consulted and retained a certified public accountant who specialized in motion picture accounting and in the investigation of motion picture distribution and participation accounting. Lasky and his attorney consulted the accountant about Lasky's rights under the "Supplemental Agreement" of May 15, 1940, as amended, with the purpose of securing a proper accounting of proceeds from Warners under the contract. (R. 76.)

Under date of May 6, 1942, Warner Brothers mailed to Lasky's attorney in Los Angeles, a statement pur-

porting to show the domestic and foreign receipts from the distribution of "Sergeant York" to February 28 1942, and Lasky's share thereof, together with its check made payable to Lasky, in the amount of $244,529.84 The statement showed, among other things, United States gross feature rentals to February 28, 1942, in the amount of $3,758,978.57, without detailed explanation The statement listed foreign income to February 28 1942, as $85,613.15, against which was offset $150,000 the latter was described as "Income on which participant does not share". The statement disclosed that "The sum of $10,000.00 has been withheld at this time by reason of the claim of alleged Skeyhill heirs." (R 76-77.)

There was attached to the check of Warner Brothers for $244,529.84, a voucher which was a permanent part of the check form. The voucher bore the legend "Void If Detached". On the voucher was typed the number of the voucher and "Your share of income from distribution of production 'Sergeant York' per statements rendered as of February 28, 1942, $244,529.84." A letter which accompanied the check described the check as "covering the amount shown by the statement to be due." (R. 77.)

Lasky was advised by his attorney not to accept the check for $244,529.84. With the approval of Lasky his attorney returned the check to Warner Brothers Pictures, Inc., by registered mail on June 3, 1942, with the following statement: "I am unable to accept the check for Mr. Lasky under the conditions as sent—." (R. 77.)

On July 10, 1942, Warner Brothers mailed taxpayer's attorney another check made payable to Lasky in the

amount of $132,692.08. On October 13, 1942, Warner Brothers mailed taxpayer's attorney another check made payable to Lasky in the amount of $193,476.70. Each check was accompanied by a statement showing the gross rentals of the York photoplay, domestic and foreign, to May 10, 1942, and to August 29, 1942, respectively, and Lasky's share up to each date. A voucher was attached to each check with the legend "Void If Detached". (R. 77-78.)

Taxpayer's attorney returned the checks for $132,692.08, and $193,476.70, to Warner Brothers with letters stating in each instance: "We are unable to accept this check under present conditions, and for that reason I am compelled to return the same." (R. 78.)

The three checks which were received by Lasky's attorney in 1942 and which were returned in 1942 totaled $570,698.62. Upon receipt of the returned checks, Warner Brothers stamped them "Void". (R. 78.)

No investigation was ever made on Lasky's behalf by his accountant or agents of Warner Brothers' records of the receipts from the distribution of the York photoplay to determine whether or not Lasky was receiving a fair accounting of his participating share of the receipts, or to determine any other matters. (R. 78.)

After the return to Warner Brothers of the three checks totaling $570,698.62, Warner Brothers did not send any more statments or any more checks to Lasky or to his attorney in payment of Lasky's participation in the York picture rentals. However, on its books, Warner Brothers continued to make credits to Lasky's account as it had done previously. (R. 78.) Exhibit Z (R. 434-438), a copy of the accounting records of Warner Brothers of Lasky's participation in the York

picture receipts shows that computations of the receipts, foreign and domestic, in which Lasky had a share, were computed as of February 28, 1942, April 4, 1942, May 2, 1942, May 30, 1942, July 4, 1942, October 3, 1942, October 31, 1942, and November 28, 1942. Also, the cumulative balances of the gross receipts on August 29, 1942, October 3, 1942, October 31, 1942, and November 28, 1942, were as follows (R. 79):

	Cumulative Total of Credits to Lasky
August 29, 1942	$570,938.37
Oct. 3, 1942	628,978.66
Oct. 31, 1942	679,013.38
Nov. 28, 1942	822,857.56

The account on the books of Warner Brothers was closed out on December 22, 1942, by the notation: "Assigned to United Artists Corporation." A check of Warner Brothers for $820,000, dated December 22, 1942, made payable to United Artists Corporation was entered in the account and was charged to the cumulative balance shown therein. Also, $2,857.56 was charged to the account as a charge to "Producer" (Lasky). The explanation written in the account for the check to United Artists in the amount of $820,000, stated, in part, as follows: "The $820,000 was in full payment of all claims of every nature arising out of the purchase of the stories as well as any share accruing from distribution of the production [the York photoplay]." (R. 79-80.)

The check for $820,000, payable to United Artists, dated December 22, 1942, bore the following notation: "Payment as per agreement dated December 22, 1942

between Warner Bros. Pictures, Inc., and United Artists Corporation." (R. 80.)

The check was paid on December 24, 1942; United Artists received payment of the check for $820,000 on December 24, 1942. (R. 80.)

In 1942, Lasky's attorney had a conference with an executive of Warner Brothers about foreign blocked funds, and the executive of Warner Brothers proposed that Lasky's share of foreign blocked funds (presumably foreign receipts from the distribution of the York picture) should be $200,000; but Lasky's attorney did not agree. Lasky's attorney discussed, at some undisclosed time, with executives of Warner Brothers criticisms which he had heard about Warner Brothers' handling of the York picture. (R. 80.)

Lasky was advised and he decided to get out of his agreement of May 15, 1940, with Warner Brothers. His attorney handled all negotiations. His attorney worked out an agreement with United Artists Corporation whereby it would pay Lasky $805,000. The agreement was consummated on December 4, 1942. United Artists was represented by its attorney. On or about December 4, 1942, Lasky received $805,000 from United Artists. (R. 80.)

United Artists, on December 22, 1942, received a check from Warner Brothers for $820,000. The check was paid on December 24, 1942. (R. 80.)

Taxpayer's attorney had been secretary-treasurer of United Artists Corporation off and on. (R. 81.)

The transaction between Lasky and United Artists was covered by an agreement which was entitled "Contract of Sale". (Ex. 7-B, R. 56-61.) It was dated December 4, 1942. Under the agreement Lasky sold and assigned to United Artists all of his interest in the

original and supplemental agreements with Warner Brothers dated May 15, 1940, and all of his interest in the motion picture "Sergeant York", including "the proceeds thereof, rights of accounting thereof, money due or to become due therefor from Warner Bros. Pictures, Inc., * * *." Under the agreement, Lasky, also, inter alia, authorized United Artists, the "purchaser", irrevocably and in his (Lasky's) name, or otherwise to do the following (Ex. 7-B, R. 56-61, 81-82):

> * * * to execute any document of any kind or character * * * and to remise, release and discharge for himself and his successors, all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, * * * claims and demands whatsoever in law or in equity which against Warner Bros. Pictures, Inc., or any other person, firm or corporation, the said Seller [Lasky] ever had, now has * * * or may have * * * relating to or in connection with the motion picture "Sergeant York," and agrees to be bound thereby as though such instruments were executed by himself, and to release and discharge Warner Bros. Pictures, Inc., from rendering any reports and accounts to him [Lasky], from paying any money to him or in anywise be responsible for or have any duties to him by virtue of or arising out of the agreements of May 15th, 1940, or any supplements or amendments thereto, and to acknowledge that Seller neither has nor shall it have any rights or interest of any kind whatsoever in and to the motion picture "Sergeant York" and to entitle Warner Bros. Pictures, Inc. to license, sell, dispose of, reissue, re-make and in every other way treat the

motion picture "Sergeant York", the negative, positive prints, stories, scenarios and other properties thereof as its sole and exclusive property without any accounting, payment or restriction of any kind to the Seller.

In consideration of all of the assignment and transfer of Lasky, "the Seller", United Artists agreed to pay Lasky, upon execution and delivery of the agreement, the sum of $805,000, in cash. (R. 82.)

On December 22, 1942, United Artists and Warner Brothers Pictures, Inc., executed an agreement entitled "Contract of Sale". (Ex. AA, R. 439-444.) Under this agreement, United Artists sold and assigned to Warner Brothers for $820,000 the contract of sale dated December 4, 1942, between Lasky and United Artists, which was attached to the contract between United Artists and Warner Brothers. United Artists, by its contract, sold and assigned to Warner Brothers all rights of every kind acquired by it under the terms of the agreement of December 4, 1942 (with Lasky), including, inter alia, its rights as follows (R. 82-84):

* * * in and to any contract and any right thereunder or claims thereunder it may have by virtue of contracts or claims thereunder which Jesse L. Lasky may have had with Warner Bros. Pictures, Inc. or any subsidiary corporation, in and to any * * * licenses it may have any interest in pertaining to or relating to the production, distribution or exhibition of the motion picture "Sergeant York," * * * any and all right, title and interest it may have by virtue of the original contract dated May 15th, 1940 between Jesse L. Lasky and Warner

Bros. Pictures, Inc., the agreement supplemental thereto of similar date, and any and all other amendments and supplements thereto including specifically the right to all moneys that are now due or which may become due to Jesse L. Lasky from Warner Bros. Pictures, Inc., thereunder * * * and any of the rights connected with production, distribution or exhibition thereof, and any and all claims, manner of action and actions, cause and causes of action, suits, sums of money, accounts, damages and demands of any kind and character Jesse L. Lasky may have against Warner Bros. Pictures, Inc., or which arise out of or in connection with the motion picture "Sergeant York" against Warner Bros. Pictures, Inc.

(4) Pursuant to the authority granted to Seller in paragraph 4 in its said agreement with Jesse L. Lasky dated December 4th, 1942, Seller does hereby for and in the name of and on behalf of Jesse L. Lasky and his successors and assigns, remise, release and forever discharge Warner Bros. Pictures, Inc. and all of its subsidiary and affiliated corporations of and from all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, and demands whatsoever in law or in equity which against Warner Bros. Pictures, Inc. and its subsidiary and affiliated corporations the said Jesse L. Lasky now has or * * * may have in and to the receipts from the distribution and exhibition thereof or any part there-

> of and does further release and discharge the said Warner Bros. Pictures, Inc. from rendering any reports and accounts to him, from paying any money to him or in anywise be responsible for or have any duties to him by virtue of or arising out of the agreement and supplemental agreement both dated May 15, 1940 between him and Warner Bros. Pictures, Inc. and all supplements or amendments thereto, and he does hereby acknowledge that he does not have nor shall he have any rights or interest of any kind whatsoever in and to the motion picture, "Sergeant York", and Warner Bros. Pictures, Inc. is entitled to license, sell, dispose of, * * * the entire receipts for the world from the distribution and exhibition thereof as its sole and exclusive property without any accounting, demand or restriction of any kind.

Taxpayer reported, in his return for 1942, one-half of the payment of $805,000 as long-term capital gain from the sale of a capital asset, as follows: "Interest in picture Sergeant York 3-15-40—12-4-42, $402,500; gain to be taken into account, $201,250.00." Taxpayer's wife reported one-half of the same long-term capital gain in her return for 1942. (R. 84-85.)

The Commissioner rejected this treatment of the receipt of $805,000, giving the following explanation in the notice of deficiency (R. 85):

> It has been determined that $805,000 representing the proceeds from a contractual interest in the earnings and profits of the motion picture "Sergeant York" received from United Artists Corporation on December 4, 1942, is taxable as ordinary income received in the year 1942.

The Tax Court concluded upon the foregoing facts that Lasky's share in the gross rentals of the York motion picture payable to him by Warner Brothers constituted ordinary income. (R. 86-88.)

The Tax Court further concluded that it was difficult to find as a fact that a bona fide dispute existed in 1942 between Lasky and Warner Brothers, that at the most the record contains only the suggestion that Lasky and his advisers were suspicious about the possible existence of grounds for the propriety of Warner Brothers' computation of the dollar amounts of Lasky's shares, their accounting practice and procedure, and their handling of the release of the film. (R. 89.)

The Tax Court found the inference to be plain that by the end of 1942 Lasky had reached a decision to step out of his contract with Warner Brothers and terminate it. (R. 89.) By the end of November, 1942, there was credited to Lasky and unpaid on the books of Warner Brothers $822,857.56. (R. 88.) The Tax Court concluded that there was no showing of any business purpose by Lasky in his arrangement with United Artists and that the record is sparse in providing any explanation for the few days' advance of funds to Lasky, which United Artists so quickly recouped out of Lasky's account with Warner Brothers through Warner Brothers' payment of $820,000. Thus, United Artists gained $15,000 for about twenty days use of its $805,000 which it advanced to Lasky, and that was the only business aspect of the arrangement as far as United Artists was concerned. (R. 90.)

The credit balance under the Lasky-Warner Brothers agreement, $822,857.56, was closed on December 22, 1942, by payment of $820,000 by Warner Brothers to

United Artists and $2,857.56 was charged to Lasky to take care of some undisclosed charge or adjustment. (R. 90.) The Tax Court concluded that when the steps taken are seen in this light there was no more than an ending of the Warner Brothers-Lasky agreement, and Lasky received the accumulated royalties or shares due him, receipt of which had been held up. (R. 91.)

The Tax Court held that by the end of 1942 taxpayer had credited to him agreed shares of the gross film rentals. Total accrued and credited payments were paid in an amount based upon an agreement which had been carried out by the obligor to the extent of tendering payments on account. The alleged "sale" of the right to receive the accruals did not convert accrued income into capital. It was in fact only payment of the total accruals to Lasky through an intermediary. (R. 91.)

Accordingly, the Tax Court sustained the Commissioner's determination of deficiencies. (R. 92.)

Subsequently upon the basis of the additional evidence introduced at the further hearing held January 21 and January 26, 1955 (R. 5, 300-374), the Tax Court found the following additional facts (R. 141-144):

Gradwell Sears was president of Vitagraph Corporation prior to October, 1941, which was a subsidiary of Warner Brothers, which provided the film distributing facilities of Warner Brothers. He had complete charge of the distribution of the picture "Sergeant York" in the United States and its possessions. In October, 1941, he left Vitagraph and became executive vice-president of United Artists in charge of world-wide distribution. He held that office during 1942. In 1941 and 1942, Edward C. Raftery was president of United Artists. Sears knew that Lasky had a minority

interest in "Sergeant York," and that the picture was successful. He recalled that an executive of Warner Brothers lamented the fact that Warner Brothers did not own the entire interest in "Sergeant York," and he "knew from advance information that Warner Brothers would very gladly acquire the entire rights in this thing ["Sergeant York"] if they became available." He did not ever talk to Lasky in regard to purchasing Lasky's interest in "Sergeant York." He recommended that Raftery discuss the possibility of acquiring Lasky's interest with Lasky's attorney. (R 141-142.)

Before December 4, 1942, a representative of Lasky visited Warner Brothers' office and obtained some figures which he communicated to Lasky's accountant, James D. Miller, who carried on his accounting practice in New York City. Miller believed, before December 4, 1942, that under Warner Brothers' accounting, more than $805,000 was due Lasky as his share of the receipts of "Sergeant York." In October, 1942, Miller believed that the picture "Sergeant York" "had been pretty well exploited domestically"; that there would still be, perhaps, some foreign exploitation; that in all probability there would be a release of restricted funds abroad; and that there would be subsequent runs of the picture. (R. 142-143.)

In 1942, Lasky's attorney was secretary of United Artists. (R. 143.)

Lasky did not know, on December 4, 1942, or before, that United Artists might resell Lasky's interest in "Sergeant York" to Warner Brohters. Lasky did not advise Warner Brothers that he was going to sell his interest in "Sergeant York" to United Artists. He

never offered his interest for sale to Warner Brothers. Lasky knew that his attorney was negotiating for the sale of his interest in "Sergeant York." His attorney was his agent and he left all the details in his attorney's hands. (R. 143.)

Lasky's attorney approached Raftery in November, 1942, and asked him if United Artists would be interested in purchasing Lasky's interest in "Sergeant York." Lasky had authorized his attorney to look for a buyer of his interest. Raftery consulted Sears about the offer of Lasky's attorney to sell Lasky's interest in "Sergeant York" and about the alternative of making a resale of Lasky's interest so as to make a little profit during 1942. Raftery also, before December 4, 1942, spoke to an officer of Warner Brothers, told him that he had an opportunity to buy Lasky's interest in the picture in question, and inquired whether Warner Brothers would be interested in purchasing Lasky's interest if United Artists decided not to keep it. The officer of Warner Brothers to whom Raftery spoke expressed the view that if United Artists bought Lasky's interest, Warner Brothers would like to negotiate with United Artists relative to purchasing Lasky's interest from United Artists. Raftery expressed his desire to make a profit on a resale of Lasky's interest. Raftery did not deal with Lasky. He dealt only with Lasky's attorney. At the time Raftery entered into the contract of December 4, 1942, to purchase Lasky's interest he knew that Lasky was entitled to some distributions of earnings of the picture in question. He had some idea of the amount of the accrued earnings due Lasky. At the time Raftery considered purchasing Lasky's interest, he knew that the picture "Sergeant York" was

not in full distribution; the "big cream" of the distr
bution had been taken off with the "pre-release" of th
picture. He knew that as a picture progresses in dis
tribution, diminishing returns set in and the return
decrease each month, and that at the time United Ar
ists acquired Lasky's interest in "Sergeant York," i
was in the phase of declining distribution. Raftery
mind was made up from the start that United Artis
would resell Lasky's interest in "Sergeant York," an
before he agreed with Lasky's attorney to purchas
Lasky's interest he found out that he could get a pu
chaser and resell Lasky's interest. He intended makin
a short profit on a resale of Lasky's interest. (R. 14
144.)

In its order and decision entered after the rehearin
and the taking of additional evidence the Tax Cou
held that it was not persuaded by the additional ev
dence that it had erred in its original findings of fa
and conclusions of law, but that the additional evidenc
further supports the conclusions it had previousl
reached. Thus, the Tax Court was of the opinion tha
the additional evidence did not establish that in 19
any real dispute existed between Lasky and Warne
Brothers; that this evidence established that the the
president of United Artists gave consideration to th
possibility of making a resale of Lasky's interest in th
picture before he concluded the contract of purchas
with Lasky, and that before he concluded the contra
he contacted an officer of Warner Brothers and told hi
that he had an opportunity to purchase Lasky's inte
est and inquired whether Warner Brothers would b
interested in purchasing from United Artists the in
terest which United Artists contemplated purchasin

from Lasky. The Tax Court concluded that the transaction of United Artists with Lasky and the transaction of United Artists with Warner Brothers shortly thereafter must be considered together and that although Lasky may not have been aware of all of the discussions and considerations of his chief agent, his attorney, nevertheless the agent's actions must be imputed to Lasky. (R. 140-141.)

The Tax Court again concluded that Lasky sold his accrued earnings in the picture amounting to $822,857.56 to United Artists at a "discount" of over $17,000, and that United Artists collected from Warner Brothers, Lasky's share of the accrued earnings to the extent of $820,000. Thus Warner Brothers acquired Lasky's interest for no more than the accrued earnings of that interest. The Tax Court held once more that it was unable to find in the entire transaction a sale by Lasky of a capital asset and a capital gain to Lasky of $805,000. (R. 141.)

Accordingly it sustained, as it had upon the original hearing, the Commissioner's determinations of deficiency. (R. 141, 144-145.)

SUMMARY OF ARGUMENT

The record amply sustains the Tax Court in concluding that the sum of $805,000 which taxpayer received in 1942 is taxable as ordinary income and not as capital gain. Under the record facts all payments which taxpayer received from Warner Brothers were ordinary income. Indeed taxpayer reported as ordinary income the sums paid to him by Warner Brothers during the years 1940 and 1941 including $196,216 which Warner Brothers paid him in 1941 from his share of the gross receipts of the distribution of the

York picture under the so-called "Supplemental Agree ment" of May 15, 1940.

If the $805,000 paid to taxpayer in 1942 had beer paid by Warner Brothers (instead of by United Ar tists) taxpayer would have been required to return th payment as ordinary income for any one of the fol lowing three reasons: (a) Even if the transaction i looked upon as a completed sale Lasky had conveye all of his rights under the York contract to Warne Brothers within much less than the holding perio under Section 117 of the Internal Revenue Code o 1939. Taxpayer admits the validity of this ground i his brief (p. 19) and explains his return in 1941 of th $196,216 from his share of the gross receipts on thi basis. (b) The Tax Court correctly regarded all th agreements with Warner Brothers as making up on transaction and Lasky's right to share in the proceed of the motion picture as due to his contribution as producer and as constituting additional compensatio and thus plainly ordinary income. (c) The amoun which Warner Brothers agreed to pay Lasky for hi rights, namely a percentage of the gross film rental of the motion picture, constituted royalties since al that Lasky acquired from York was a license upo which he was obligated to pay royalties to York an the arrangement with Warner Brothers was one unde which Warner Brothers was obligated to pay distinc royalties to two successive assignors of rights, whic were only a license.

The payment to taxpayer of the $805,000 in 1942 wa the payment of an amount of ordinary income whic had already been earned, accrued and accumulated i the transaction with Warner Brothers, and the cir

cumstance that the payment was made by a third party, United Artists, could not convert this accrued income into capital. Taxpayer's whole case turns on the circumstance that the payment was made to him not by Warner Brothers but by United Artists. If such a contention should be sustained there would be conferred on every taxpayer the power at his own choice and volition to convert earned ordinary income into capital gain through the simple device of "selling" the right to receive ordinary income at a discount to a third party. Congress in granting the favor of the capital gain rights authorized no such result. Simply because a contract may be denoted for some purposes as "property" does not change ordinary income, which has accrued under it, into capital. The Tax Court held taxpayer accountable for ordinary income on these past earned and accrued amounts and on nothing more. This holding, even assuming, *arguendo*, there was separate reality to the Lasky-United Artists transaction and that some other "property" was transferred to United Artists in addition to the accrued and earned income, is sustained by ample authority. An alleged "sale" of what has accrued as ordinary income does not convert accrued income into capital.

Additionally the Tax Court concluded on the facts that United Artists was a mere intermediary and the three-party transaction in reality was no more than termination of the Warner Brothers-Lasky participation agreement. In reaching this factual conclusion, the Tax Court on the instant record was certainly not clearly wrong. The Tax Court based its conclusion on the testimony of the six witnesses taken at the hearing and the rehearing, the documentary evidence and the record as a whole. This question was primarily for

determination by the trier of the facts, especially since there was substantial oral testimony and the credibility to be afforded to the witnesses is peculiarly for the fact finder who saw and heard them and possessed the opportunity to observe their demeanor upon the stand

ARGUMENT

The Record Amply Sustains the Tax Court in Concluding tha the Sum of $805,000 Which Taxpayer Received in 1942 I Taxable as Ordinary Income and Not as Capital Gain

A. *Under the record facts all payments which taxpaye received from Warner Brothers were ordinar income*

Taxpayer received substantial payments from War ner Brothers under the transaction with respect to the York photoplay and concededly reported all of these payments as ordinary—and not capital, income. Thus for the year 1940 taxpayer reported as ordinary income (R. 69) the $40,000 paid to him by Warner Brothers pursuant to the agreement of May 15, 1940 (under which Lasky sold to Warner Brothers all of his rights in the York story and all other rights he had acquired under the contract with York of March 23, 1940 (R 65)), as well as the $58,500 paid to him by Warner Brothers under the agreement of May 8, 1940 (R. 65) which employed him as producer. Again, in 1941 taxpayer received $196,216.80 from his share of the gross receipts of the distribution of the York picture (under the so-called "Supplemental Agreement" of May 15 1940 (R. 67-69)), which he reported in his return for 1941 as ordinary income (R. 71, 88). Indeed, in his brief (p. 19) taxpayer admits that he—

> reported the income under the contracts with Warner Bros. during the year 1941 as ordinary

income because at the time of the sale to Warner Bros., he had not held the property rights in the contract with Sgt. York for the requisite holding period so as to be entitled to report the proceeds of the sale as long-term capital gain.

In other words, even under taxpayer's own reasoning, Lasky was required to return payments received from Warner Brothers in connection with the Sergeant York transaction as ordinary income, inasmuch as even if the transaction is looked upon as "a completed sale" Lasky had conveyed all of his rights to Warner Brothers within much less than the holding period.[1] (Br. 19.) The implication follows from the concession contained in taxpayer's own brief that if the $805,000 paid to Lasky in 1942 had been paid by Warner Brothers (instead of by United Artists) taxpayer would have been required to return the payment as ordinary income, precisely as he admittedly correctly returned as ordinary income the $196,216 percentage of gross rentals of the photoplay received in 1941.

As a matter of fact, however, the Tax Court correctly regarded all the agreements with Warner Brothers as making up one transaction (R. 87) and that Lasky's right to share in the proceeds of the motion picture was due to his contribution as a producer and constituted additional compensation, thus, for this additional reason clearly ordinary income, not capital gain

[1] Section 117(a)(2) and (4) of the 1939 Code, as it read in 1940, provided for a holding period of eighteen months; in 1942 this period had been reduced to six months. See Section 117(a)(2) and (4), *supra*. Assuming without conceding that Lasky, having obtained rights from Sergeant York on March 23, 1940, "sold" them to Warner Brothers on May 15, 1940, he had held them for much less than the holding period before the purported "sale."

(R. 88). The Tax Court was plainly warranted on th record in looking at the transaction as a single inte grated unit. The so-called employment agreement, a though dated May 8, 1940, referred to the subsequentl dated agreement of May 15, 1940, under which Warne Brothers had purchased from Lasky the rights trans ferred to him by York. (R. 66.) Besides this employ ment agreement dated May 8, 1940, was under its term retroactive to April 1, 1940, and Lasky actually re ceived $1,500 a week from April 1, 1940. (R. 65-67. Indeed, under the agreement of May 15, 1940, Lask received only $40,000 (R. 67), namely, only $15,000 i excess of the $25,000 he had paid York, not taking int consideration the traveling and other expenses he ha incurred in obtaining the contract from York. Ac cordingly, while the so-called "Supplemental Agree ment," under which Lasky was to be paid a percentag of the gross receipts of the photoplay, is a separat document from the employment agreement, dated Ma 8, 1940, and from the agreement of May 15, 1940, unde which Lasky received the $40,000 payment (R. 67-69) the Tax Court surely might infer that all three agree ments in substance constituted one transaction. Indee taxpayer's testimony at the hearing fully sustains th Tax Court's conclusion that the transaction was single (R. 187-188, 199-200.) Submittedly there is warrant i the record for this factual conclusion and it is no clearly wrong.

Hence, the basic character of the transaction wa correctly found by the Tax Court to be one in whic taxpayer's participation in the gross receipts of th film rental constituted additional compensation due t his contribution as a producer and thus plainly ordinar

income. *Strauss* v. *Commissioner,* 168 F. 2d 441, 442-443 (C.A. 2d) certiorari denied, 335 U. S. 858; *Shuster* v. *Helvering,* 121 F. 2d 643 (C.A. 2d); *Shamlin* v. *Commissioner,* 16 T.C. 407.

Further the Tax Court also held that the amount which Warner Brothers agreed to pay Lasky for his rights, namely, a percentage of the gross film rentals of the motion picture, constituted "royalties." All Lasky had acquired from York was a license to produce a motion picture and what York was paid constituted royalties. (R. 64, 86-87.) It is immaterial that Warner Brothers also had to pay royalties to York. The arrangement was one under which Warner Brothers was obligated to pay distinct royalties to two successive assignors of rights, which were only a license. This result follows from taxpayer's assignment of the York contract. (R. 87-88.) *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C.A. 2d); *Rohmer* v. *Commissioner,* 153 F. 2d 61 (C.A. 2d), certiorari denied, 328 U.S. 862; *Commissioner* v. *Wodehouse,* 337 U.S. 369.

Accordingly, under any one of the three grounds above stated payments to Lasky by Warner Brothers for his share in the gross rentals of the film constituted ordinary income.

B. *The payment to taxpayer of the $805,000 1942 was the payment of an amount of ordinary income which had already been earned, accrued and accumulated in the transaction with Warner Brothers and the circumstance that the payment was made by a third party, United Artists, could not convert this accrued income into capital.*

The finding of the Tax Court is not disputed and the record abundantly establishes that there was a balance

of earned income credited in taxpayer's favor on t
books of Warner Brothers as of November 28, 19
in the amount of $822,857.56, being the cumulat
amount of taxpayer's share of the gross receipts
the York picture, then earned due and owing to hi
(R. 78-79, 88-89, Ex. Z, R. 434.) There was nothi
contingent, indeterminate or tentative about t
amount; it was taxpayer's then and there—his carr
share of participation in the gross film rentals.

This amount was plainly subject to his dominion a
control. Indeed in the course of its accumulation
had actually been received by his attorney in 1942
the extent of $570,698.62 and returned. (R. 78.) T
Tax Court surely was warranted in inferring th
after the end of November, 1942, taxpayer could ha
obtained the entire $822,857.56 upon demand.
the Tax Court correctly pointed out (R. 91) this
not a case where indeterminate or future payments we
converted into a lump sum.

Had the $822,857.56, or the lesser $805,000, wh
Lasky actually received from United Artists abo
December 4, 1942 (R. 80), been paid him by Warn
Brothers, there can be no doubt (see subpoint A, *supr*
that it would have constituted a receipt of ordina
income; indeed, as already pointed out, taxpaye
brief (p. 19) impliedly concedes as much.

Thus taxpayer's whole case turns on the circumstan
that the payment was made to taxpayer not by Warn
Brothers, but by a third party, United Artists, taxpay
under date of December 4, 1942, having assigned
United Artists his claim against Warner Broth
for moneys past due as well as all of his interest in t
original and supplemental agreements of May 15, 19

(R. 81-82.) Surely if taxation is, as often said, a practical matter, the mere assignment of the right to receive this earned and accrued ordinary income did not convert the earned income into a capital asset. If such a contention should be sustained, there would be conferred on every taxpayer the power at his own choice and volition to convert earned ordinary income into capital gain through the simple device of "selling" the right to receive the ordinary income at a discount to a third party. By this expedient the taxpayer would readily save the substantial difference between the ordinary and capital gain tax rates, the third party would benefit through the receipt of quick discount money; only the Government would lose.

Certainly Congress in granting the favor of the capital gain rates authorized no such result. Indeed, provisions granting partial tax exemption, such as Section 117, must be strictly construed and a taxpayer must bring himself clearly within their terms, as the present taxpayer has not. *Sloane* v. *Commissioner,* 188 F. 2d 254, 259 (C.A. 6th).

Simply because a contact may be denoted for some purposes as "property" does not change ordinary income, which has accrued under it, into capital or turn into capital gain an amount paid for the assignment of ordinary income already owed and due under it. The statute deals in economic realities, not legal abstractions.

In October, 1942, two months prior to the Lasky-United Artists transaction, the picture "had been pretty well exploited domestically" (R. 142, 325) in the opinion of taxpayer's accountant, and subsequently in early December, when United Artists entered the scene, its president knew that the "big cream" (R. 144,

371) had been taken off and that it was in the phase o declining distribution. Taxpayer's representativ knew (and plainly taxpayer himself knew or mu be held to have known) before December 4, 1942, th more than $805,000 was due him as his share of t receipts (R. 90-91, 142, 330-331); and the president United Artists knew of these accrued earnings al (R. 144, 367-368, 369-370).

The Tax Court held taxpayer accountable for ord nary income on these past earned and accrued amoun and on nothing more. This holding, even assumi *arguendo* there was separate reality in the Lask United Artists transaction and that some other "pro erty" was transferred to United Artists in addition the accrued and earned income, is sustained by amp authority (*Watson* v. *Commissioner,* 345 U.S. 54 affirming the decision of this Court 197 F. 2d 56). A alleged "sale" of what has accrued as ordinary incor does not convert accrued income into capital. Indee the recent decision of this Court in *United States Snow,* 223 F. 2d 103, certiorari denied, 350 U.S. 8 directly supports this principle. There this Cou said (p. 108):

> However, it is not decisive of the issue he presented to find that the subject matter proper bears the capital asset label. It is a fundament principle of federal tax law that you must rega any ordinary income derived from an income-pr ducing capital asset as ordinary income. Cons quently, the assignment of accrued ordinary incor must be treated separately from the assignment the capital asset which produced the income. Th is not an exception to the rule that capital asse

held for more than six months shall be given capital gains tax treatment. It is only when a capital asset appreciates in value and is subsequently sold, beyond the six months' period, that the gain realized may be given capital gains tax treatment under Section 117 of the Internal Revenue Code.

The general rule is that a right to receive ordinary income, produced by a capital asset, is not transmuted into a capital asset by the sale or assignment of the capital asset together with the right to receive the ordinary income.

In the *Snow* case (p. 109) this Court quoted from and cited with approval the decision of the Sixth Circuit in *Fisher* v. *Commissioner*, 209 F. 2d 513, certiorari denied, 347 U.S. 1014, which constitutes further clear authority for the Commissioner's position here. See also *Hale* v. *Helvering*, 85 F. 2d 819 (C.A. D.C.); *Helvering* v. *Smith*, 90 F. 2d 590, 592 (C.A. 2d); *Rhodes' Estate* v. *Commissioner*, 131 F. 2d 450 (C.A. 6th); *Shuster* v. *Helvering, supra, Shumlin* v. *Commissioner, supra.*

Indeed, taxpayer's contention here would involve approval of anticipatory arrangements and contracts as a means of avoiding the ordinary income tax rates, analogous to devices repeatedly condemned by the Supreme Court. *Lucas* v. *Earl*, 281 U.S. 111; *Burnet* v. *Leininger*, 285 U.S. 136; *Helvering* v. *Eubank*, 311 U.S. 122. The payment here represented a right to income and its character as accrued ordinary income is not changed by the assignment. *Harrison* v. *Schaffner*, 312 U.S. 579. See also *Hort* v. *Commissioner*, 313 U.S. 28, where an amount substituting for future rental payments was held ordinary income. *A fortiori* in the in-

stant case the payment which substituted for past an accrued ordinary income must be held taxable as ord nary income. Indeed, the Tax Court pointed out tha this is not a case where indeterminate and future pay ments were converted into a lump sum. (R. 91.)

O'Brien v. *Commissioner,* 25 T.C. No. 48, decide November 30, 1955, relied upon by taxpayer (Br. 2- 25) is readily distinguishable. There a producer upo completion of a film sold one-half of his ten percer interest in its profits to the director of the picture for lump sum, but contrary to the record situation, no a signment of past-due earned and accrued ordinary in come was involved. Here on the other hand the a crued ordinary income exceeded in amount the sum pai to and received by the transferor-taxpayer. The Ta Court memorandum decision also cited by taxpayc (Br. 25), *Pacific Finance Corp. of Calif* v. *Commi sioner,* decided April 17, 1953 (1953 P-H T.C. Mem randum Decisions, par. 53,129) is similarly distinguis able.

Besides under the facts of the cited *O'Brien* case, there had been any past earnings of the picture to whi the producer there was entitled, such earnings mig not have ben ordinary income in his hands even if pa by R.K.O., since the situation there was unlike th here, where concededly Lasky had conveyed all h rights to Warner Brothers within much less than t holding period and all his receipts from Warner Brot ers were ordinary income.

C. *The Tax Court was not clearly wrong in holding that United Artists was a mere intermediary and the three-party transaction was no more than a termination of the Warner Brothers-Lasky participation agreement*

As discussed in the preceding subpoint B, even if the transaction between taxpayer and United Artists is considered to have independent reality separate from the subsequent United Artists-Warner Brothers agreement of a few weeks later, the $805,000 payment by United Artists to taxpayer representing no more than the accrued ordinary income due him from the gross rentals did not lose its character as ordinary income and must be taxable at ordinary income rates. However, the Tax Court concluded on the basis of the testimony of six witnesses taken at the hearing and rehearing of the documentary evidence and the record as a whole, that United Artists was a mere intermediary; that there was no showing of a business purpose to Lasky in Lasky's arrangement with United Artists; that the record does not provide any satisfactory explanation for the few days' advance of funds to Lasky, which United Artists so promptly recouped out of Lasky's account with Warner Brothers, through Warner Brothers' payment to United Artists of $820,000. This represented a gain to United Artists of $15,000 for about twenty days' use of the $805,000, which it had advanced to Lasky. (R. 90, 140-141.) The Tax Court concluded that there was no more than an ending of the Warner Brothers-Lasky agreement and Lasky received the accumulated earnings due him and that as a matter of fact and in reality there was only payment

of the total accruals to Lasky through an intermediar
(R. 91.)

The evidence warranted the Tax Court in conclu
ing on the record that taxpayer had failed to establis
that any real dispute existed in 1942 between him ar
Warner Brothers. At the most the record suggeste
only that Lasky and his advisers were suspicious th
possibly grounds existed for challenging Warn
Brothers' computations and accounting practice ar
procedure in their handling of the release of the fil
(R. 89.) But Lasky did not as much as authorize a
audit of Warner Brothers' accounting records and
his share in the receipts (R. 89, 140), even though h
had a clear right to such an accounting, had he so d
sired (R. 68-69). The Tax Court also noted that n
testimony was adduced from any executive of Warn
Brothers about any dispute with Lasky. It conclude
that Lasky's testimony did not establish that whatev
suspicions he may have had crystalized during 19
into issues constituting a real dispute. (R. 89.) I
deed, Lasky continued to work for Warner Brothe
during eighty-three weeks on various projects fro
January 11, 1943, to April 24, 1944, receiving $150,5
as an associate producer. (R. 70.)

In any event the Tax Court was warranted in infe
ring that by the end of 1942 Lasky decided to step ou
of its contract with Warner Brothers and to termina
it. In the agreement he made with United Artists
December 4, 1942, he authorized United Artists to r
lease and discharge Warner Brothers from paying an
money due and owing to him and in turn United Artis
in the document it executed with Warner Brothe
on December 22, 1942, did so release and discharg

Warner Brothers. (R. 81-84, 89.) Warner Brothers in turn closed its account with Lasky and paid $820,000 in cash to United Artists, charging Lasky with the $2,857.56 balance to take care of some undisclosed adjustments. (R. 79-80, 89-90; Ex. Z, R. 434.)

The Tax Court also found that before he concluded the contract of purchase with Lasky, the president of United Artists gave consideration to the possibility of making a resale of Lasky's interest in the picture to Warner Brothers, that he had contacted an officer of Warner Brothers and told him that he had an opportunity to purchase an interest of Lasky's and inquired whether Warner Brothers would be interested in purchasing it. (R. 140, 143-144.) The president of United Artists had made up his mind from the start that United Artists would resell Lasky's interest in "Sergeant York" and before he agreed to purchase Lasky's interest he found out he could get a purchaser. (R. 44.) He intended making a short profit on the resale of Lasky's interests. (R. 143-144.)

As already noted above, in December, 1942, all the parties knew of Lasky's accrued earnings and also knew that the picture had been pretty well exploited at that time and that it was in the phase of declining distribution. Certainly the Tax Court was justified in concluding that Lasky could not through this transaction, involving his taking a discount of some $17,000 in the amount of earnings of the picture then due (R. 141), deprive the Government of taxes totaling almost $450,000.

The question of what the transaction between these three parties in reality was is a question of fact, and thus is primarily for determination by the trier of the

facts. *Commissioner* v. *Court Holding Co.,* 324 U.
331. The Tax Court's factual findings here susta
ing the Commissioner's determinations are entitled
finality "unless clearly erroneous." Rule 52(a), F
eral Rules of Civil Procedure; Internal Revenue Co
of 1954, Section 7482(a) (26 U.S.C. 1952 ed., Su
II, Sec. 7482). Rule 52(a) further provides: "* *
due regard shall be given to the opportunity of
trial court to judge of the credibility of the witnesse
Here there was substantial oral testimony and
credibility to be afforded to the witnesses, includi
interested witnesses, in view of all the circumstan
of the case, is for the fact finder, who saw and hea
them and possessed the opportunity to observe th
demeanor upon the stand. *Grace Bros.* v. *Comm
sioner,* 173 F. 2d 170, 174 (C.A. 9th); *Joe Balestri
& Co.* v. *Commissioner,* 177 F. 2d 867, 873-874 (C
9th); *Earle* v. *Jones,* 200 F. 2d 846 (C.A. 9th); *Gre
feld* v. *Commissioner,* 165 F. 2d 318 (C.A. 4th); *K
Underwear Co.* v. *United States,* 127 F. 2d 965 (C
3d), certiorari denied, 317 U. S. 655,

As the Supreme Court said in *United States* v. Y
low Cab Co., 338 U. S. 338, 341:

> Findings as to the design, motive and *int*
> with which men act *depend peculiarly* upon
> credit given to witnesses by those who see a
> hear them. [Italics supplied.]

CONCLUSION

In the event that this Court denies the Commissi
er's motion to dismiss the petitions for review here
the ground that this Court is without jurisdiction,
is alternatively urged that the decisions of the T

Court on the merits are correct and should be affirmed.[2]

Respectfully submitted,

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MARCH, 1956.

[2] As an alternate question on the merits the Commissioner urged in the Tax Court that $570,698.62 ordinary income was received by taxpayer in 1942 or was constructively received (R. 62) through the payments which Warner Brothers made to taxpayer, but which were returned (R. 76-78). Inasmuch as the Tax Court resolved the chief question in favor of taxpayer, it did not pass upon the Commissioner's alternate contention. In the event that this Court should disagree with the Tax Court on the merits it is requested that the case be remanded to the Tax Court for further consideration and decision on the Commissioner's alternate contention.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,868

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petitions for Review of the Decisions of the Tax Court of the United States

MEMORANDUM BRIEF ON BEHALF OF PETITIONERS IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

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FILED

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

APR 18 1956

PAUL P. O'BRIEN, CLERK

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SUMMARY OF JURISDICTIONAL FACTS

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiencies, in which he determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that

the petitioner, Jesse L. Lasky, owed a deficiency for the taxable year 1943 in the amount of $224,515.44 (R. 10 14, 62). Thereafter, on January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States (R. 7-14). The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decision ordering and deciding that the taxpayers owe the deficiencies in income tax for the taxable year 1943 in the amount as determined by the Commissioner of Internal Revenue (R. 92-93).

Thereafter, on August 24, 1954, petitioners filed a motion for leave to file a motion to vacate the decisions out of time and a motion to vacate decisions entered April 8 1954 (R. 93-94). On December 13, 1954, the Tax Court entered an order vacating and setting aside the decision of April 8, 1954 and granted the petitioners a further hearing on the merits (R. 135). Thereafter a rehearing of the case was held in Washington, D. C., on January 2 and January 26, 1955 (R. 300-355). At the rehearing the testimony of the accountant for the petitioners was taken for the first time. Also received was the testimony of Gradwell Sears who was, in 1942, the executive vice president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October 1941 president of a subsidiary of Warner Brothers which distributed Warner Brothers pictures. He had been the distributor of the picture "Sergeant York" for Warner Brothers. The testimony of the president of United Artists in 1942 was also taken. Additional testimony of Jesse L. Lasky was received (R. 139-140). On June 30, 1955, the Tax Court in the case of each petitioner entered a memorandum sur order and decision and an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there are deficiencies in income tax for the taxable year 1943 as

determined by the Commissioner of Internal Revenue (R. 138-145).

Petitions for review were filed on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955 (R. 149).

QUESTION PRESENTED

Did the Tax Court have discretionary power to vacate and set aside its decisions of April 8, 1954, and grant petitioners a further hearing on the merits?

ARGUMENT

It is petitioners' position that the Tax Court had discretionary power to vacate and set aside its decisions of April 8, 1954, and the mere fact that the statutory period during which an appeal may be taken had expired did not deprive the Tax Court of jurisdiction.

Petitioners are not unmindful that some of the cases cited by the respondent hold that because the statutory period during which an appeal may be taken has lapsed deprives the Tax Court or Court of Appeals of jurisdiction. Compare: *Swall* v. *Commissioner*, (CA-9, 1941), 122 F. (2d) 324, 27 AFTR 845; *Denholm & McKay Co.* v. *Commissioner*, (CA-1, 1942), 132 F. (2d) 243, 30 AFTR 572. However, an examination of these cases shows that there is no controlling reason why the Tax Court, like other Courts does not have inherent power to control, amend, open and vacate its decisions to accomplish justice in accordance with the modern trend. It is the position of the petitioners that the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U.S. 131, 81 L. Ed. 557, completely supports their position. There the petitioner on November 25, 1935, filed a petition for a corporate reorganization under Section 77(b) of the bankruptcy act as amended. The respondent filed objections to the petition and a motion to dismiss. On March 2, 1936, the Bankruptcy Court dismissed the petition. On appeal, the Circuit Court of Appeals denied the appeal, holding the petitioner should

have proceeded under Section 25(a) of the Bankruptcy Act instead of 24(b). Petitioner then presented a petition to the District Court sitting in bankruptcy, praying vacation of the order of March 2, 1936, and a rehearing and a review of the matters arising in the proceeding because of errors committed by the court in dismissing its petition. The Court granted the petition to vacate the order and for a rehearing and set aside the order of March 2, 1936, and granted a rehearing and review. After the rehearing was held the Court on May 28, 1936 again sustained the respondent's objection and dismissed the petitions. Petitioner then appealed the order of May 28, 1936, to the Circuit Court of Appeals under Section 25(a) of the Bankruptcy Act. The Circuit Court of Appeals on respondent's motion dismissed the appeal. The Supreme Court held that the power of the Bankruptcy Court to grant or refuse a rehearing rested in its sound discretion and since in the proper exercise of that discretion the Court entertained the application and reheard the case on the merits, its action again dismissing the petition for reorganization was a final order and the appeal therefrom was timely. The Supreme Court opinion in holding that the Bankruptcy Court did not lose power to vacate the judgment merely upon the lapse of the statutory period during which an appeal may be taken completely demolishes the reasoning behind the cases cited by the respondent as to why a special rule should be applicable to the Tax Court of the United States. There it was stated: (p. 136)

> "In the alternative, the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a

fresh order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. * * *"

Compare: *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 87 L. Ed. 147.

In the recent case of *Reo Motors, Inc.* v. *Commissioner*, (CA-6, Feb. 23, 1955) 219 F. (2d) 610, the Court of Appeals held that the Tax Court had power to vacate and correct its decisions after the time for appeal had expired. In

support of its opinion it cited with approval the action of the Tax Court in the instant case, saying:

> "We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e. g. *Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117 (1926); *Stern* v. *Commissioner*, 215 F. (2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis*. Cf. *United States* v. *Morgan*, 346 U. S. 502 (1954); *United States* v. *Mayer*, 235 U. S. 55 (1914); Rule 60(b), Federal Rules of Civil Procedure.
>
> "This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 630 (1933); and very recently, by the Tax Court itself in *Bessie Lasky, Jesse L. Lasky* v. *Commissioner*, Tax Court Dockets Nos. 26396 and 26397 (1954). * * * "

The mere fact that Section 1140, Internal Revenue Code, states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a United States District Court becomes final 30 days after its entry unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73(a) of the Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its judgment after time for appeal has lapsed cannot be doubted.

Some of the decisions cited by the respondent indicate that there is some peculiar necessity in Tax Court cases to know when a decision is "final" in order to inform the Commissioner when he can make an assessment, or allow a credit or make a refund. See *Denholm & McKay Co.* v. *Commissioner,* (CA-1, 1942) 132 F. (2d) 243, 30 AFTR 572. This position is not realistic. There is nothing sacred about an assessment. Assessments, credits, abatements and refunds of taxes are being made all the time. For example, in the case of a jeopardy assessment, the assessment is made and often the tax collected. Yet as the result of a settlement or a Tax Court decision the Commissioner may have to allow credits, make abatements or refunds. No particular administrative problem would arise as the Commissioner would have the power to make the assessment until the decision was reversed or modified. Until the decision was reversed or modified on a proper showing, the assessment would continue in existence. The situation would be exactly the same as exists on an appeal from the Tax Court where the taxpayer elects to pay the deficiency rather than give bond. If the Appellate Court reverses, the taxpayer receives a refund if he has paid the tax. Section 1146, Internal Revenue Code of 1939 provides:

> "SEC. 1146. *Refund, Credit, or Abatement of Amounts Disallowed.* In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated."

There is no greater necessity for finality in Tax Court cases than in bankruptcy cases where the rights of a debtor and creditors are involved. In fact, in Tax Court cases no rights of third parties will be involved. In the instant case, no rights of others have vested on the faith of the Court's decision of April 8, 1954. A United States Dis-

trict Court in a tax refund suit would have the power to vacate its judgment under the state of facts that exists in the case at bar. Consequently, it can be seen that from an administrative standpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty.

At page 21 of his brief, the respondent states:

> "Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Board '*has become final*'."

The respondent then cites Section 272(b) of the Internal Revenue Code and would have this Court believe that the Commissioner is prohibited from making an assessment until after the three-month period within which an appeal may be filed. This is not true. Immediately upon the entry of a Tax Court decision the Commissioner can make an assessment. The only way to stay assessment and collection is by filing a petition for review and giving a bond under Section 1145, Internal Revenue Code. That section provides:

> "SEC. 1145. *Bond to Stay Assessment and Collection.* Notwithstanding any provisions of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect to such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy

> bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced."

It should also be pointed out that the interpretation of Section 1140 of the Internal Revenue Code does not mean that in all situations the decision becomes "final" within three months from the entry of decision if no petition for review is filed. In *Denholm & McKay Co.* v. *Commissioner*, (CA-1, 1942) 132 F. (2d) 243, 30 AFTR 572, it is stated at page 576:

> "Despite statutory provisions requiring appeals to be taken within a stated period 'after the entry of the judgment' or 'after the judgment is rendered' or words to the same effect, it has long been held that if a petition for rehearing is seasonably presented and entertained by the court, the time limited for appeal does not begin to run until the petition is disposed of. [citing many Supreme Court cases]. The foregoing rule has been applied to timely petitions for rehearing filed in the Board of Tax Appeals; in such cases the period for filing a petition for court review does not begin to run until the Board has disposed of the petition for rehearing. *Griffiths* v. *Commissioner*, 7 Cir. 1931, 50 F. (2d) 782; *Burnet* v. *Lexington Ice & Coal Co.*, 4 Cir. 1933, 62 F. (2d) 906; *Helvering* v. *Continental Oil Co.*, 1933, 63 App. D. C. 5, 68 F. (2d) 750; *Helvering* v. *Lonis*, 1935, 64 App. D. C. 263, 77 F. (2d) 386, 99 A. L. R. 620. * * * "

The point is that Section 1140, Internal Revenue Code, dealing with the finality of decisions is interpreted the same as other statutes dealing with finality of judgments. Therefore, the cases relied on by the respondent which base their conclusion on the "peculiar" language of that section are out of step with *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131, 81 L. Ed. 557.

As pointed out in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* the granting of a rehearing was discretionary with the Tax Court. Petitioners were before the Tax Court not as a matter of right on their motion to vacate the decisions but by special leave of Court. The Tax Court properly exercised its discretion in vacating the decisions and granting petitioner a further hearing on the merits since the additional evidence proffered showed the decisions of the Tax Court to be wrong.

The respondent's brief cites many cases that involve entirely different factual and procedural situations. For example, respondent cites and relies on *Helvering* v. *Northern Coal Co.,* (1934) 293 U. S. 191, 79 L. Ed. 281, and *R. Simpson & Co.* v. *Commissioner,* (1944) 321 U. S. 225, 88 L. Ed. 688. These cases involve the question whether the Supreme Court could grant a petition for rehearing more than 30 days after its mandate had issued or 25 days after a petition for certiorari had been denied. That is not the issue in this case.

The respondent argues in his brief that no extraordinary circumstances appear which warranted the Tax Court to vacate its decisions of April 8, 1954. This is to say that the facts did not justify the Tax Court in exercising its discretion. The facts which justified the Tax Court in exercising its discretion in vacating its original decisions and granting petitioners a further hearing are clearly set forth in the record. See Appendix B—Statement of Facts in Support of Motion to Vacate Decisions and for Rehearing (Respondent's Brief in Support of Motion for Lack of Jurisdiction). The petitioners represented to the Tax Court that the additional evidence would show that its original opinions and decisions were wrong on the merits. It is still the petitioners' position that the Tax Court's opinions and decisions are erroneous and that the additional evidence and testimony presented at the rehearing fully support petitioners' position. The Tax

Court in its orders and decisions of June 30, 1955, (R. 138-145) briefly sets forth the reasons for its action in vacating the decisions and granting the rehearing.

At page 33 et seq. of his brief, respondent quotes from the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131, 81 L. Ed. 557, where it is said:

> "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal] the appeal must be dismissed."

Respondent contends this principle has instant application and cites the case of *Commissioner* v. *Realty Operators,* (1941) 118 F. (2d) 286, 26 AFTR 680. There the admitted purpose of the Court in vacating the decisions was to enter a new decision from which to appeal. No rehearing or reconsideration was requested. This case is clearly distinguishable from the case at bar where the *bona fides* of the situation is shown by the additional testimony and documentary evidence which was introduced at the rehearing, the submission of additional briefs, and the Tax Court's reconsideration of the entire case on the merits and its subsequent entering of memorandum sur order and decisions in the cases. Under these circumstances, it cannot be said that the Tax Court merely vacated its original decision in order to extend the time for appeal. It was pointed out in the *Wayne United Gas Co.* case that a defeated party who applies for a rehearing and does not appeal within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. From necessity, the petitioners had to assume this risk in this case. Fortunately they had good grounds for requesting a further hearing and reconsideration of their case on the merits. The Tax Court exercised its sound discretion and vacated the original decisions and granted a further hearing and reconsidered the case on its merits. The mere fact that petitioners from

necessity were compelled to follow this alternative procedure does not indicate that the Tax Court's action in vacating the original decisions was not bona fide.

At page 28 et seq. of his brief, the respondent discusses the case of *Reo Motors* v. *Commissioner,* (CA-6, 1955) 219 F. (2d) 610. He takes the position the case was not correctly decided by the United States Court of Appeals for the Sixth Circuit and also attempts to point out certain factual differences between that case and the case at bar. Despite this, the Sixth Circuit held that the Tax Court had power to vacate and correct its decisions after the time for appeal had expired and cited with approval the action of the Tax Court in the instant case. Accordingly it must be admitted that the *Reo Motors* case is directly contrary to the position the respondent is urging in this motion to dismiss.

CONCLUSION

The respondent's motion to dismiss for lack of jurisdiction should be denied since the Tax Court had power to exercise its sound discretion and vacate its original decision and grant petitioners a further hearing on the merits.

Respectfully submitted,

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April 5, 1956.

No. 14,870

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD STANLEY and
MARION L. TAYLOR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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FILED
NOV - 9 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,870

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD STANLEY and
MARION L. TAYLOR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this case under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant Richard Stanley was convicted in Criminal No. 33907 on one count of sale of 18 grains of heroin in violation of the Harrison Narcotic Act and one count of concealment of the heroin in violation of the Jones-Miller Act. In Criminal No. 33903 he was convicted on one count of sale of 37 grains of heroin

in violation of the Harrison Narcotic Act and one count of concealment of the heroin in violation of the Jones-Miller Act. Appellant Richard Stanley and appellant Marion L. Taylor were both convicted in Criminal No. 33902 with the sale of 1½ grains of cocaine in violation of the Harrison Narcotic Act. Appellant Taylor received a 5-year sentence and a fine of $100. Appellant Stanley received 5-year sentences on all counts in the three indictments of which he was convicted plus a $500 fine. The 5-year terms in Criminal Nos. 33903 and 33907 are to run concurrently, and the 5-year sentence in Criminal No. 33902 is to run consecutive to the terms of imprisonment on the other two indictments for a total sentence of ten years.

Appellant Taylor first applied for relief under Section 2255 of Title 28 United States Code on January 26, 1955. On that same date United States District Judge George B. Harris denied the motion. Application was made to this Court for permission to appeal in forma pauperis from this decision. A per curiam opinion of this Court denied permission to appeal in forma pauperis after the court below had certified that the appeal was not taken in good faith. *Taylor v. United States* (C.A. 9, 1955), 221 F.2d 228. Thereafter, appellant Taylor made a second motion to vacate under the provisions of Section 2255 of Title 28 United States Code. This motion consisted of a summary of petitioner's views of the evidence at the trial. Numerous contentions of error were made. On June 29, 1955 United States District Judge George

B. Harris denied appellant's motion to vacate. Appeal was then made to this Court.

On September 20, 1954 appellant Richard Stanley moved to vacate his sentence under Section 2255 of Title 28 United States Code. On September 22, 1954 United States District Judge George B. Harris denied appellant's motion. It does not appear that appeal was taken from this order. Thereafter, appellant Stanley made a second motion to vacate under Section 2255 of Title 28 United States Code. This motion was denied on July 6, 1955. Appeal was made to this Court from that order.

QUESTION PRESENTED.

Is the sentencing court required to entertain a second motion under Section 2255 of Title 28 United States Code?

ARGUMENT.

Both appellants, prior to the orders which form the subject of their appeal in this case, were denied relief under motions made pursuant to Section 2255 of Title 28 United States Code. Section 2255 provides that

> "the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

This Court has held that a court is without jurisdiction to entertain a successive motion for relief

under Section 2255 of Title 28 United States Code. *Winhoven v. Swope* (C.A. 9, 1952), 195 F.2d 181, 183. This principle was recently reaffirmed in another decision involving Winhoven. *Winhoven v. United States* (C.A. 9, 1955), 221 F.2d 793. In *United States v. Hayman* (1952), 342 U.S. 205, the court upheld the constitutionality of Section 2255. The court below was clearly not required and was without jurisdiction to grant the relief prayed for by appellants.

Both appellant Taylor and appellant Stanley are attempting to relitigate their cases before this Court. A jury passed upon appellants' contention. The court below held that the evidence was sufficient for their conviction. Appellants may not constitute this Court as a new jury to retry their cases. Motions under Section 2255 are in the nature of a collateral attack of the judgment. No contention is made in either petition justifying collateral impeachment of the jury's verdict. The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 9, 1955.

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Attorneys for Appellee.

No. 14880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

THE BRIDGFORD COMPANY, a Corporation,

Bankrupt.

PAUL W. SAMPSELL, Trustee in Bankrupcty for the Estate of The Bridgford Company, a Corporation, Bankrupt,

Appellant,

vs.

HUGH H. BRIDGFORD,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
FEB 10 1953

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

THE BRIDGFORD COMPANY, a Corporation,

Bankrupt.

PAUL W. SAMPSELL, Trustee in Bankrupcty for the Estate of The Bridgford Company, a Corporation, Bankrupt,

Appellant,

vs.

HUGH H. BRIDGFORD,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from an order after hearing on motion to modify an order made by Honorable Ben Harrison, United States District Judge, on August 20, 1954, and on which prior order the appellant seeks a review and reversal as well as the amended order.

The appellant is the Trustee in Bankruptcy of the Bridgford Company, a corporation, bankrupt. The appellee is Hugh H. Bridgford, who was the president and a director and a major stockholder of the Bridgford Company, and during the bankruptcy was a court-appointed

manager of the Bridgford Company. The real question involved here is whether Mr. Bridgford is going to be permitted to take advantage of his fiduciary position and obtain a substantial portion of the assets of his bankrupt corporation as against the interest of his creditors generally.

The appeal from the original order, although taken more than thirty days after its entry, is taken under the authority of *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U. S. 131, for the reason that the District Court entertained the motion of the Trustee to reconsider and clarify the original order, and made a new order which was even more disastrous to the bankrupt estate than the original order. Hence this appeal.

Jurisdiction.

The original jurisdiction of the Bankruptcy Court was invoked under Section 2-a, Subdivision 1 of the National Bankruptcy Act by the debtor filing its original voluntary petition under Chapter XI of the National Bankruptcy Act on April 25, 1947, and its subsequent adjudication by the Referee. The jurisdiction of this Court is invoked under Section 25-a of the National Bankruptcy Act.

The Facts.

In outlining the facts in this case, we are taking as true, the facts found by the Referee, the original trier of fact, in connection with this controversy. The reversal by the District Judge is based purely on his conclusion that the Referee had erred in subordinating the claim of Hugh H. Bridgford, president of the bankrupt corporation, to the rights of creditors whose produce had enriched the estate during Bridgford's management under

the supervision of the Bankruptcy Court, and a substantial portion of the proceeds of which went to Bridgford after he had learned that the Referee was going to adjudicate The Bridgford Company a bankrupt. We submit that the Referee was right and the District Judge erred both in overruling the Referee on the question of subordination and in according this unfaithful officer a position of priority over claims accrued on or before February 2, 1948, and placing it in a priority over claims accruing on or after February 3, 1948, and later by his Order dated May 23, 1955, giving the Bridgford claim priority over all claims and indebtedness whether incurred or occurring either before or after February 2, 1948 (except administrative costs and expenses).

On April 25, 1947, The Bridgford Company filed a voluntary petition in the United States District Court for the Southern District of California, Southern Division, seeking relief under Chapter XI. The debtor was permitted to remain in possession of its assets, the Court retaining jurisdiction until the consummation of the Plan. [See Referee's Certificate on Review, R. p. 130.] One of the Court-appointed managers in charge of the bankrupt's assets and funds was the Appellee, Hugh H. Bridgford. Bridgford was president of the debtor corporation. [See Findings of Fact, Conclusions of Law, etc., R. p. 113.]

During the course of administration under Chapter XI, the Bankruptcy Court authorized the issuance of $30,000.00 worth of Receiver's or Debtor's certificates[1] which

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[1]In this brief these certificates may be referred to interchangeably as "Receiver's" Certificates and "Debtor's" Certificates. Both designations refer to the same evidence of debt.

were purchased by one R. H. Hadley. [See Referee's Findings of Fact, etc., Finding II, R. p. 111.] These certificates were not a lien against the assets of the debtor's estate but were given priority in payment as against indebtedness existing at the time of their issue. [See Finding III, R. p. 111.]

On or about July 8, 1949, a petition was filed by three creditors requesting the adjudication of The Bridgford Company as a bankrupt, or a dismissal of the proceedings under Chapter XI. [See Finding VI, R. p. 112.] Hearings were had on this petition and concluded on November 4, 1949. The Court announced that it was going to find the debtor in default under its Plan of Arrangement, and that it would order an adjudication in bankruptcy. This announcement was made in the presence of the Appellee and the other Court-appointed managers. [See Finding VI, R. p. 112.]

After the adjournment of the hearing at which the Referee announced his intention to adjudicate the debtor a bankrupt, Bridgford proceeded to protect himself in connection with the payment of these debtor's certificates. Owing to the intervention of a week end it took three days or more for the preparation of a formal written order of adjudication, but in the meantime respondent Bridgford was anything but idle. On November 7, 1949, he presented a petition for an order authorizing him to pay out the funds represented by the debtor's certificates theretofore issued, on which there remained a balance of $25,996.40 principal and interest. [See Finding VIII,

R. p. 115.] He failed to disclose to the Referee that he had acquired these debtor's certificates gratis, and the Referee, being deceived by Bridgford's concealment of facts, to which he owed the Court a disclosure, signed an order authorizing their payment. [See Finding IX, R. p. 114.] Had the Referee been informed that Bridgford, president of the bankrupt corporation and a trusted officer of the Court, had acquired these certificates without paying anything for them, he would never have signed the order authorizing their payment. [See Finding IX, R. p. 114.] The order of adjudication was entered on November 8, 1949. Paul W. Sampsell was appointed Trustee, and upon ascertaining the fact that the president of the debtor in possession had paid himself in full on debtor's certificates acquired by him for nothing, and out of money accumulated in the estate from the proceeds of processed raw materials purchased from farmers and unpaid for, sought by appropriate petition to get the money back from Bridgford. [See Findings IX, X and XI, R. pp. 114-116, incl.] When Bridgford got through paying himself and a few others he had left, in this grossly insolvent estate the small sum of $60.00. [See Finding VII, R. p. 113.] Mr. Sampsell, as Trustee, inherited expenses of administration, liabilities to various Oregon farmers for produce purchased during the Chapter XI proceedings, amounting to $100,000.00 or more, in addition to the liabilities owed prior to the filing of the voluntary petition. [See Finding XII, R. p. 116.]

The turnover proceeding directed against Bridgford came on for hearing commencing June 12, 1953, after

a trial before the Referee, and findings of fact and conclusions of law and a turnover order against Hugh Bridgford were entered. The order provided that Bridgford be allowed a general claim against the bankrupt estate in the sum of $30,000.00 upon repayment by him to the bankrupt estate of the sum of $25,996.40 which he had paid himself, his claim, however, to be subordinated to the payment of all claims and indebtedness against the bankrupt estate, including the expenses of administration. [See findings of fact, conclusions of law and order after hearing on objections of trustee to claim of Hugh H. Bridgford for $30,000.00, R. p. 110, *et seq.*] Bridgford, feeling aggrieved by the Referee's order, took a review. Originally, the review was before Judge Jacob Weinberger at San Diego, but because of calendar conditions, was heard and determined by Judge Ben Harrison. The order of the Referee requiring Bridgford to turn over his ill-gotten gains and subordinating his claims was modified by the District Judge, and no appeal was taken from that order by the Trustee. The order, however, was somewhat vague, and the Trustee, being in doubt as to just what course he should pursue, filed a petition with the Judge seeking clarification and modification of the original order in question. [R. p. 145 *et seq.*] The Court entertained the Trustee's petition, heard argument thereon, and proceeded to modify the order in a more drastic manner than before. [R. p. 148.] In the modified order, the District Court accorded priority to the claim of Bridgford over all claims and indebtedness (including the claims of the Oregon farmers) excepting, however, the fees, costs and expenses of administration. The Trustee took his appeal within thirty days after the entry of the second order which superseded and modified the original.

ARGUMENT POINTS AND AUTHORITIES.

The first question which will naturally arise is whether or not the appeal taken from the District Court's order after hearing on motion to modify order on review will encompass the original order entered by the District Court on August 20, 1954. We submit that it does. The order of August 20, 1954, modifying the Referee's order, left a doubt as to the disposition or status of Bridgford's claim. The Trustee filed a motion to clarify and correct findings of fact, conclusions of law and order modifying order of Referee. The District Court set the matter for hearing and heard it on April 11, 1955. Thereafter, he made his order after hearing on motion to modify order on review, placing Bridgford's claim in a prior position to all claims and indebtedness incurred after February 3, 1948, including the claims of the Oregon farmers. The Trustee took a timely appeal from this order, and we submit that under the rule laid down by the Supreme Court of the United States in *Wayne United Gas Company v. Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 557, the appeal from the clarified order was timely, and the Trustee's time to appeal was tolled. We quote from the Supreme Court's decision in the *Wayne United Gas Company* case (at p. 561):

> "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. The District Court's action conformed to

these conditions. Two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order of March 2, 1936, petitioner notified respondents of its intention to apply for rehearing. Prompt application was made and the cause was promptly heard. A supplemental petition was presented and entered upon the files by leave of court. The original, the amended, and the supplemental petition were considered upon the merits, and the court made findings and announced conclusions of law with respect thereto. There is no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. The court found that no rights had intervened which would render it inequitable to reconsider the merits. There was no abuse of sound discretion in granting the motion and reconsidering the cause.

"The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

"Reversed."

The Supreme Court based its ruling, that the time for appeal ran from the entry of the subsequent order on rehearing, on the following authorities under footnote 13:

"Compare Aspen Min. & Smelting Co. v. Billings, *supra* (150 U. S. p. 37, 37 L. ed. 988, 14 S. Ct. 4); Voorhees v. John T. Noye Mfg. Co., *supra* (151 U. S. p. 137, 38 L. ed. 102, 14 S. Ct. 295); Citizens Bank v. Opperman, 249 U. S. 448, 450, 63 L. ed. 701, 702, 39 S. Ct. 330; Morse v. United States, *supra* (270 U. S. p. 154, 70 L. ed. 519, 46 S. Ct. 241)."

The Appellee, Hugh H. Bridgford, Was Guilty of Faithless Conduct Both as an Officer of the Bankrupt Corporation and as Debtor in Possession Appointed by the Bankruptcy Court, and the Referee Was Correct in Requiring Him to Pay Back the Money He Had Appropriated Unto Himself and to Subordinate His Claim to All Claims and Indebtedness, Including Costs and Expenses, of Said Bankrupt Estate.

We believe that the conduct of Mr. Bridgford was reprehensible in the extreme and deserved condemnation on the part of the District Court rather than permitting him to have a position of priority over the Oregon farmers. Bridgford was president of the bankrupt corporation. As such he was permitted by the Bankruptcy Court to function as debtor in possession under Chapter XI of the Bankruptcy Act, Section 342.

Under Section 1911 of 18 U. S. C. A. he was required under sanction of criminal penalties to operate the property in his possession in accordance with the requirements of valid laws of the State in which the property was situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. A portion of the property in question was located in the State of California, and the bankrupt was and is a corporation doing business in the State of California. Bridgford was therefore required under Section 1911 of 18 U. S. C. A. to manage the property under his control in accordance with the law of California. What restrictions were placed upon him both as an officer of the bankrupt corporation and an officer of the Bankruptcy Court? That Bridgford in his capacity as manager for the debtor in possession was an officer of the Court cannot be gainsaid.

Under Section 343 of Chapter XI, he had the right and power, subject to the control of the Court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the Court might from time to time fix.

As far back as 1856, the Supreme Court of California laid down definite rules governing the conduct of persons in a fiduciary capacity.

In *Page v. Naglee,* 6 Cal. 241, at 245, the Supreme Court said:

> "It is a familiar principle in law, that one who is a trustee, or who stands in a situation of trust and confidence, cannot purchase or deal with the subject of the trust, neither can he purchase debts due, to be paid out of the trust estate, nor place himself in an attitude of antagonistic to the trust. The purchase by the defendant of the one thousand dollars indebtedness of Page, Bacon & Co., and the judgment obtained in the name of S. C. Hastings, if not a fraud in fact, was in violation of his duties as a trustee of said firm, and it makes no difference in this respect, whether the instrument conveying the property to himself and Parrott was a deed of trust or mortgage, or whether the same was void or not."

Following this comes a long line of decisions of the Supreme Court of California, which rigidly circumscribe the rights of a fiduciary to acquire property entrusted to him or to purchase claims against his trust at a discount and enforce such claims for the full amount. In the case of *Bonney v. Tilley,* 109 Cal. 346, the Supreme Court of California, quoting from Cook on Stock and Stockholders, Section 660, incorporated this principle into its decision:

> "In Cook on Stock and Stockholders, section 660, it is said: 'It is a fraud on the corporation and on

corporate creditors for the directors to buy up at a discount the outstanding debts of the corporation and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.' "

In *Wickersham v. Crittenden,* 93 Cal. 17, the Supreme Court of California said (at p. 29):

"The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage. (Cook on Stocks and Stockholders, sec. 648; Morawetz on Private Corporations, sec. 516; Cumberland Coal Co. v. Sherman, 30 Barb. 571; Hoyle v. Plattsburgh & M. R.R. Co., 54 N. Y. 328; 13 Am. Rep. 598; Barnes v. Brown, 80 N. Y. 535; San Diego v. San Diego etc. R.R. Co., 44 Cal. 106; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Farmers' etc. Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62.) For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or ac-

quire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the *cestui que trust*. (Story's Eq. Jur., sec. 322; Davoue v. Fanning, 2 Johns. Ch. 252; Taussig v. Hart, 58 N. Y. 428; Elevated R.R. Case, 11 Daly 486; Michoud v. Girod, 4 How. 503; Davis v. Rock Creek, 55 Cal. 364; 36 Am. Rep. 40.) 'So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the interest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other person; they may even at the time have been better, but still, so inflexible is the rule that no inquiry on that subject is permitted.' (Aberdeen R'y Co. v. Blaikie, 1 Macq. 461.) It is declared in the Civil Code, sec. 2229: 'A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner.'"

Again in *Pacific Vinegar and Pickle Works v. Smith,* 145 Cal. 352, the Court said:

"These authorities lay down two propositions: 1. That an expressed contract cannot be entered into by a director with himself relative to the trust property; and 2. That the court will not permit any inquiry into the question of the honesty or fairness of the transaction.

"The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction."

In the *Pacific Vinegar Works* case, the Supreme Court of California based its condemnatoin of a fiduciary dealing with trust property on behalf of himself on the following California cases:

Davis v. Rock Creek etc. Mining Co., 55 Cal. 359;
Sims v. Petaluma Gas Co., 131 Cal. 659;
Aberdeen Ry. Co. v. Blakie, 1 Macq. H. L. 461;
Munson v. Syracuse etc. R.R. Co., 103 N. Y. 74.

Summarzing on page 366 of the Opinion, the Court said:

"So harmonious is the law on this subject that authorities might be cited indefinitely, but reference is made only to those in this state where the principles have been discussed, reiterated, and approved."

The Court then proceeds to cite eleven more cases in support of the principle, with which we will not burden this Court.

See also:

Estate of Howard, 284 P. 2d 966.

In the case at Bar, Bridgford acquired these debtors' certificates for nothing. His duty as a fiduciary required under the rule laid down in *Bonney v. Tilley,* 109 Cal. 346, at 352, that he turn over to the estate these evidences of indebteness, instead of hastily procuring the countersignature of the Referee on a check to him for the full amount, without disclosing to the Referee that he had acquired these certificates which he sought to enforce against the estate, without any consideration whatsoever.

Nor are the Federal Courts one whit more tolerant toward such dealings.

In the *Matter of the Van Sweringen Company,* 119 F. 2d 231 (C. A. 6th), in cutting down a claim asserted by the Van Sweringen Brothers from $8,177,023.99 to the amount of $1.00 plus interest, and another claim of $13,787,000.00 to $887.00 plus interest, and a third claim for $1,348,614.99 to $2.00 plus interest, the Court said:

> "We think the District Court correctly held that the 'Midamerica Corporation acquired and holds these notes, bonds and securities as Trustee for the respective debtors whose obligations or assets they were,' and that 'the amounts paid for the notes and bonds measure the extent of its claims against these debtors.'
>
> "From the manner and under the circumstances in which, in association with outside enterprisors, the

Van Sweringens, as directors of insolvent corporations, purchased these claims against their *cestui que trustent,* the debtors, herein, at substantially less than real values, equity and good conscience demand that the claims of their corporate creature, Midamerica (predecessor to appellant), be limited to the amounts actually paid by it for the notes and bonds of the insolvent corporations. See, Bonney v. Tilley, 109 Cal. 346, 42 P. 439; *In re* McCrory Stores Corporation, D. C., 12 F. Supp. 267; Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157, 124 N. E. 449, 10 A. L. R. 363; Lingle v. National Insurance Co., 45 No. 109; Canton Roll & Machine Co. v. Rolling Mill Co., 4 Cir., 168 F. 465; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Lonsdale v. Speyer, 1936, 249 App. Div. 133, 291 N. Y. S. 495; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L. R. A., N. S. 1106.

"As expressed by Chief Judge Cardozo in Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "distintegrating erosion" of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.' We uphold the standard of this doctrine. . . .

> "Where the directors of a corporation, contrary to their fiduciary duty, have made a personal profit in their dealings with the corporation, equity will compel them to account to the corporation for such profits made at its expense. . . .
>
> "It is apparent here that the cupidity of persons in a fiduciary position has caused them to serve themselves in preference to those whom it was their duty to serve. Such dereliction is forbidden by just principles of law."

Also, in the case of *Los Angeles Lumber Products Co.,* 46 Fed. Supp. 77, Judge Jenney of this District, held that the recovery on bonds purchased by a fiduciary of the corporation during insolvency should be limited to the amount actually paid therefor. (To the same effect see: *Canton Roll & Machine Co.,* 168 Fed. 465; *Martin v. Chambers,* 214 Fed. 769.)

On the subject of subordination of claims of officers, directors and stockholders, and the equitable powers of the bankruptcy court in connection therewith, the Supreme Court of the United States, in the case of *Pepper v. Litton,* 308 U. S. 295, 60 S. Ct. 238, speaking through Justice Douglas, said:

> "That equitable power also exists in passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation. The mere fact that an officer, director, or stockholder has a claim against his bankrupt corporation or that he has reduced that claim to judgment does not mean that the bankruptcy court must accord its *pari passu* treatment with the claims of other creditors. Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. Twin-Lick

Oil Company v. Marbury, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. Southern Pacific Company v. Bogert, 250 U. S. 483, 492. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. Geddes v. Anaconda Copper Mining Company, 254 U. S. 590, 599. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.

"As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the

power and duty of the bankruptcy courts under the reorganization sections. In Taylor v. Standard Gas & Electric Co., 306 U. S. 307, 38 Am. B. R. (N. S.) 692, this court held that the claim of Standard against its subsidiary (admittedly a claim due and owing) should be allowed to participate in the reorganization plan of the subsidiary only in subordination to the preferred stock of the subsidiary. This was based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors. Similar results have properly been reached in ordinary bankruptcy proceedings. Thus, salary claims of officers, directors and stockholders in the bankruptcy of 'one-man' or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors. And that result may be reached even though the salary claim has been reduced to judgment. It is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitations on the part of the claimant."

Again, in the case of *Sampsell v. Imperial Paper & Color Corporation,* 313 U. S. 215, 45 A. B. R. (N. S.) 454, the court said:

> "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete." (Citing authorities.)

The authorities on this subject are so voluminous and the law is so well established that it seems unnecessary to

impose on the time of the court by citing additional authorities on this point.

The most recent case before this Court involving employees of the Bankruptcy Court is the case of *Donovan & Schuenke, et al. v. Sampsell, as Trustee, et al.,* 226 F. 2d 804. In that case, one D. J. Miller was president of Ridgecrest Development Co., a bankrupt. In the course of the administration, he procured an order from the Referee in charge of the proceeding, authorizing him, in the interests of economy of administration, to collect rents on certain income properties belonging to the bankrupt estate, and remit them to the Trustee. He was to receive a small compensation for this work. When the property came up for sale in open Court, he asked the Referee if there would be any objection to his making a bid or becoming a purchaser. The Referee, with knowledge that Miller had done some work for the bankrupt estate, saw no reason why Miller's money was not as good as anyone else's, and permitted him to make a bid. Miller was the successful high bidder and the sale was confirmed to him. The time to review the order of confirmation expired, and several months thereafter certain creditors of the bankrupt corporation and certain stockholders attacked the sale as being void and in violation of Section 154 of Title 18, U. S. C. A. The Referee denied the petition of the creditors and stockholders seeking to set the sale aside and was affirmed by the District Court. On appeal to this Court, the orders of the District Judge and of the Referee were reversed and the sale held to be null and void.

In reversing the District Court and the Referee, Judge Fee of this Court, in quoting from *Pepper v. Litton,* 308 U. S. 295 at 306, said:

> "Once a corporation is adjudged a bankrupt, the equitable powers of the court are used in accordance with considerations of public policy, which are deeply grounded upon fundamental principles. There the obligations of an officer or director of a corporation to the stockholders and creditors often require drastic measures. As was said by Mr. Justice Douglas in Pepper v. Litton, 308 U. S. 295, 306:
>
> " 'A director is a fiduciary. * * * So is a dominant or controlling stockholder or group of stockholders. * * * Their powers are powers in trust. * * * While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation-creditors as well as stockholders.' "

The opinion of this Court was based largely on *Mosser v. Darrow,* 341 U. S. 266, 95 L. Ed. 927. In that case Darrow, as Trustee, was surcharged by the United States District Court for the Eastern District of Illinois in the sum of $43,447.46. The surcharge was based on the fact that Darrow, as Trustee, had employed Jacob Kulp and Myrtle Johnson, who thoroughly knew the inside of the business of the bankrupt's common law trusts. When he employed them he had an understanding with them that they would be permitted to speculate in the securities of the bankrupt. In the course of the administration they purchased numerous bonds at a substantial discount and

retired them in the bankruptcy proceeding at profits to themselves in excess of $40,000.00. Darrow claimed to have discussed the matter of their activities with District Judge Holly, but did not disclose to the District Judge that he was employing these people on terms which permitted trading in the underlying securities. The Court of Appeals for the Seventh Circuit reversed the order surcharging the Trustee, basing its decision on the fact that the Trustee himself had not personally made a profit out of the transactions of his subordinates. The United States Supreme Court granted certiorari and reversed the Seventh Circuit. We quote from this opinion written by Justice Jackson, as follows:

> "This was a strict trusteeship, not one of those quasi-trusteeships in which self-interest and representative interests are combined. A reorganization trustee is the representative of the court and it is not contended and would not be arguable that if he had engaged for his own advantage in the same transactions that he authorized on the part of his subordinates he should not be surcharged. Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate inquiries as we have here into the conduct of its own appointees by exacting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question.
>
> "These strict prohibitions would serve little purpose if the trustee were free to authorize others to do what he is forbidden. While there is no charge of it here, it is obvious that this would open up op-

portunities for devious dealings in the name of others that the trustee could not conduct in his own. The motives of man are too complex for equity to separate in the case of its trustees the motive of acquiring efficient help from motives of favoring help, for any reason at all or from anticipation of counter favors later to come. We think that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself."

Further on the Court said:

"But equity has sought to limit difficult and delicate fact-finding tasks concerning its own trustee by precluding such transactions for the reason that their effect is often difficult to trace, and the prohibition is not merely against injuring the estate—it is against profiting out of the position of trust. That this has occurred, so far as the employees are concerned, is undenied."

In *In re Frazin & Oppenheim,* 181 Fed. 307, the Court of Appeals for the Second Circuit, in reversing an order of the United States District Court for the Southern District of New York, which confirmed a sale made of bankrupt's assets to one of the appraisers through a third party, said:

"It is a long-established principle of equity jurisprudence that a trustee cannot become a purchaser of the trust estate. And not only trustees, strictly speaking, but agents, attorneys, and all persons acting in behalf of other persons and obtaining confidential information concerning their affairs, cannot purchase their property, except under certain restraints not necessary to be considered here. Lord

St. Leonards thus stated these elementary principles in his treatise on Vendors and Purchasers (Sugden on Vend. and Purch. (2d Am. Ed. from 5th London Ed.), p. 422), and his statement has many times been quoted with approval by judges and text-writers:

"'It may be laid down as a general proposition that trustees, unless they are nominally so, as trustees to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned; for, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *"Emptor emit quam minimo potest, venditor vendit quam maximo potest."*'

"The application of these principles is not dependent upon the engagement of one person by another in a confidential capacity. There need be no contract of employment at all. There need be no formal relation of trust. The disability grows out of the duty. In our opinion the rule of equity should be so broadly applied as to embrace all persons who have a duty to perform with respect to the property of others and with the proper performance of whose duty the character of a purchaser of such property may be in any degree inconsistent."

Bearing in mind that appellee hastily prepared a petition and order for disbursement of all funds in the debtor in possession's hands, with the exception of approximately $60.00, after the Referee had announced at his hearing on November 4, 1949, that he had found the debtor in default and would order an adjudication, and wedged this petition and order in between November 4 and November 7, when the formal order of adjudication could be entered, thus securing payment to himself of his debtor's certificates, we cannot refrain from quoting some of the pungent language used by the Court in condemning activities of those who are on the "inside" to secure advange to themselves while in a trust or fiduciary capacity. The staccato language used by Justice Douglas in *Pepper v. Litton,* vividly describes the disabilities placed upon an "insider" in dealing with his trust. We quote (at p. 284):

> "He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of the privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be

exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

We also quote from the language of the Second Circuit in *In re Frazin & Oppenheim,* 181 Fed. 307 at 310:

"The nature of the position of an appraiser is such that he necessarily obtains confidential information concerning many other matters affecting its value and the price to be obtained for it. His duty is to appraise it at a fair and reasonable value, for, if it is sold not subject to the approval of the court, only such an appraisal will afford protection to the estate. But a report of the value of the property to be sold, made by a prospective bidder for it, could hardly be considered a reliable guide for the action of the court. Would an appraisal be implictly relied upon in which the appraiser reported that the property was of the value of $16,000, but that he had entered into an agreement to bid $40,000 for it?"

In the case at Bar, this appellee functioning on behalf of a corporation as debtor in possession had incurred, in the administration under Chapter XI, an indebtedness to the Oregon farmers for produce in a sum in excess of $100,000.00. His inside information as an officer of the Court enabled him to know the amount of indebtedness incurred during the administration, the intention of the Referee to adjudicate the corporation a bankrupt, the outstanding debtor's certificates in the possession of Hadley, the willingness of Hadley to convey these debtor's certificates without consideration to the appellee on the eve of his going to the hospital. [See testimony of R. H. Hadley, R. pp. 164, 166, 167 and 169, and testimony of

Hugh H. Bridgford, R. pp. 178 and 179.] He directed his attorneys to prepare a petition including payment to him of funds out of the estate at that time, and verified the same and presented it promptly to the Referee in order to obtain the necessary order. All of this was accomplished in three days time. Supposing instead of his having been a trusted functionary of the Bankrupcty Court there had been a Receiver in Bankruptcy, holding office at that time, and Bridgford had desired payment to him of these debtor's certificates. Supposing there had been a distinterested and impartial attorney representing the Receiver. Supposing that Bridgford had gone to the Receiver with debtor's certificates originally issued to Hadley and demanded payment in full with interest at once. Naturally, a conscientious Receiver (or his attorney) would inquire of Bridgford, president of the debtor corporation, how it happened that he was in possession of Hadley's debtor's certificates, what consideration he had paid therefor, whether or not he owed a duty to the debtor corporation to give it the advantage of the discount at which he had acquired these certificates, and would no doubt have said, "Hold it for a few days until we know just where we all stand. What's the rush? A few days delay in payment will not make any material difference." Facts underlying this sordid transaction could then have been exposed to the light of day, with the result that Bridgford would have received exactly what he paid Hadley for these debtor's certificates—nothing. Instead, we have a situation where, utilizing his inside position, Bridgford was able to have his personal attorney, who represented him in this proceeding, prepare a petition for immediate payment, present it to the Referee, procure an order for payment to him of these

certificates, prepare a check for the debtor's certificates in full, payable to himself and procure the Referee's counter-signature thereon without disclosing to the Referee that he had obtained these certificates at a discount of 100%. In the meantime, the unfortunate farmers in Oregon who had furnished the raw material out of which the funds so disbursed had been realized, not being on the inside, as was Mr. Bridgford, now find themselves placed behind him in the distribution of the funds of this insolvent estate. A clearer case of breach of a fiduciary relationship could not be imagined. It may be true that had Hadley retained these certificates he would have been entitled to payment in full. In the hands of Bridgford, as assignee thereof, any realized profit should, under the principles repeatedly enunciated by the Courts, have accrued for the benefit of the bankrupt estate or the corporation of which Mr. Bridgford was and is president. (*Bonney v. Tilley,* 109 Cal. 346.)

The Referee was correct in subordinating Bridgford's claim to the claims of those creditors who had sold produce to the bankrupt corporation during the term of management under the Bankruptcy Court's supervision, and whose produce had created the fund out of which Bridgford paid himself, and the District Judge erred in placing Bridgford's claim in a superior position to these defrauded Oregon farmers.

During Bridgford's administration of this bankrupt estate, it incurred liabilities in the operation of the business to certain Oregon farmers in an amount in excess of $100,000.00. [See Referee Finding of fact XII, R. p. 116.]

On November 4, 1949, after a hearing at which it had been demonstrated that the Chapter XI administration

was a failure, the Referee announced that he was going to adjudicate the Bridgford Company a bankrupt. Bridgford immediately swung into action to feather his own individual nest. He procured the outstanding debtor's certificates from R. H. Hadley without any consideration whatsoever, and three days later on November 7, 1949, before a formal order of adjudication could be prepared and entered, he presented to the Referee a petition for payment as a prior claim of the certificates of indebtedness, and without informing the Referee that he had obtained these certificates gratis, issued a check payable to himself and procured the Referee's counter-signature thereon. [See Referee Findings VII, VIII and IX, R. pp. 113-114.] As found in Finding VII, Bridgford's payment to himself and a few others left the estate with the sum of $60.00 balance on hand, and the Oregon farmers holding the proverbial sack.

In *Northtown Theatre Corporation v. Michelson,* 226 F. 2d 212, the Court of Appeals for the Eighth Circuit said:

> "The legality of a claim from a purely technical aspect does not preclude its disallowance or subordination on equitable grounds. The bankruptcy court in passing on claims sits as a court of equity. It has the power to disallow or subordinate claims in the light of equitable considerations and can sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate. This power exists as a matter of the Federal law of bankruptcy."

In *United States Trust Company v. Zelle, et al.,* 191 F. 2d 822 at 825, the Eighth Circuit said:

> " 'It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receiver-

ship and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. * * * That the proceeding before us has moved from equity receivership through Section 77B to Chapter X (11 U. S. C. A., Secs. 207, 501 *et seq.*) in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or Section 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents.' 329 U. S. *loc. cit.* 165, 67 S. Ct. *loc. cit.* 241."

See also:

Pepper v. Litton, 308 U. S. 295;

Sampsell v. Imperial Color & Paper Corp., 313 U. S. 213;

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590 at 599.

The only reimbursement that Bridgford would be entitled to would be the actual amount paid for these debtor's certificates. If he had purchased them for $1.00, that would have been the extent of his claim. Having obtained them for nothing, he was entitled to nothing in the face of creditors' claims.

See:

In re Los Angeles Lumber Products Co., 46 Fed. Supp. 77.

In condemning conduct somewhat similar to the conduct of Bridgford in the case at Bar, United States District Judge Ford, in the *Matter of Wesley Corporation,* 18 Fed. Supp. 347 at 355, said:

"By long-established principles of equity jurisprudence, nothing is more clearly established than

that a trustee may not become the purchaser of the trust estate either directly or through agents or other persons acting in his behalf. Both creditors and bankrupt alike have the right to expect that the trustee will not use his official position to speculate for his personal profit in the property entrusted to his care. The duty to enforce these principles rests no greater upon any courts than upon the federal courts of bankruptcy. The prime object of Congress in enacting the bankruptcy laws was to secure for creditors as well as bankrupts the efficient and fair administration of estates. *In re* Frazin & Oppenheim (C. C. A.), 181 F. 307; *In re* Allen B. Wrisley Company (C. C. A.), 133 F. 388; *In re* Hawley (D. C.), 117 F. 364; Remington on Bankruptcy, Sec. 2560. It is not important whether the price paid at the sale was adequate in a particular instance. The rule rests upon vital considerations of public policy and is applicable in every case. If the facts alleged in this amendment be true, the duty of the court to require the trustee to account for all proceeds derived from the property, including any profits from its resale, is clear and imperative."

The opinion of the late District Judge Ralph E. Jenney, *In re Los Angeles Lumber Products Co., Ltd.,* 46 Fed. Supp. 77, is a far more complete brief of the law relating to fiduciaries than the writer of this brief could ever hope to write. The opinion is approximately 17 pages long, but we respectfully commend it to the attention of this Court. We quote just one paragraph which Judge Jenney took from *Brambett v. Commonwealth Land & Lumber Co.,* 26 Ky. Law Rep. 1176, 83 S. W. 599-602:

> " 'When he (the receiver) agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a

position in which his personal interests were, or might be, antagonistic to those of his trust. Michoud v. Girod (45 U. S. 503), 4 How. 503, 552, 11 L. Ed. 1076. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. Magruder v. Drury, 235 U. S. 106, 119, 120, 35 S. Ct. 77, 59 L. Ed. 151. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. Magruder v. Drury, 235 U. S. 106, 35 S. Ct. 77, 59 L. Ed. 151. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. Emery v. Parrott, 107 Mass. 95, 103; Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 134, 79 N. W. 229, 74 Am. St. Rep. 845; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L. R. A. (N. S.) 1106. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relation to the estate; the later, without regard to the fact that he was also counsel for the receiver.' (Pages 588, 589 of 254 U. S., page 201 of 41 S. Ct., 65 L. Ed. 418.)

"We have no hesitancy in declaring the law to be that a president of an insolvent and failing corporation cannot traffic in its property to his advantage and to its disadvantage, or buy in debts against it at heavy discount and then assert them for full value. To the argument that it does not matter to the corporation *who owns its debts,* (italics ours) so it honestly owes them, and that it is immaterial to it

whether its president gets them for nothing, as it does not have to pay any more than it actually owes in any event, the answer is, it does matter, for human nature is not so constituted that the same person can fairly represent opposing sides of the same question —cannot be both creditor and debtor. * * * The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them." (Italics ours.)

Was the Appeal of This Case Taken in Time?

In this connection we will conclude this brief by a short discussion of this question. The law seems to be well settled that where a petition for reconsideration or rehearing has been entertained by the District Court in connection with an order made by it, even though on rehearing or reconsideration the District Court adhered to its former position, the time to appeal ran from the entry of the subsequent order instead of from the entry of the original order. In this case the Trustee petitioned the District Judge for a clarification of his earlier order. After a hearing thereon, the District Judge made a new order giving Bridgford a priority over the Oregon farmers and all other creditors.

In the *Matter of Brigantine Beach Hotel Corp.,* 197 F. 2d 296 at 300, the Court of Appeals for the Third Circuit discussed the timeliness of a similar appeal and the authorities on which its decision was based in the following language:

"Though no motion for dismissal of the appeal from the order of November 29, 1951 was filed by appellees, the claim is made that the appeal from that order, filed January 28, 1952, was taken too late. There is no doubt that the district court ac-

cepted the petition for rehearing. The good faith of the debtor in seasonably urging reargument is not disputed. There is no suggestion that the district court abused its discretion in entertaining the petition or that any intervening rights were prejudiced by that action. Under these circumstances, it is plain that the time for the debtor to appeal from the order of November 29, 1951 was extended, even though the district court reaffirmed its former position, and ran anew from the denial of the petition for rehearing on January 28, 1952. Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557; Bowman v. Loperena, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177; Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 63 S. Ct. 133, 87 L. Ed. 146. Rule 59(b), 28 U. S. C. A., which generally requires a motion for a new trial to be served not later than ten days after the entry of the judgment has not changed this law. See 2 Collier on Bankruptcy (14th ed.), page 909 *et seq.* We think it equally settled, however, that in such a case as this, the debtor's appeal lies only from the original order on November 29, 1951. Here the debtor appealed not only from that order but also from the order of January 28, 1952. The latter order, being merely the denial of the petition for rehearing which had been entertained, is itself not the subject of appeal. Pfister v. Northern Illinois Finance Corp., *supra,* 317 U. S. at page 149, 63 S. Ct. 133; Klein's Outlet, Inc. v. Lipton, 2 Cir., 181 F. 2d 713, 714, certiorari denied 340 U. S. 833, 71 S. Ct. 59, 95 L. Ed. 612; United States v. Muschany, 8 Cir., 156 F. 2d 196, 197. Though the debtor has taken this appeal from both orders, we confine our review to the order of November 29, 1951."

Conclusion.

The Bankruptcy Court is a court of equity. In the exercise of its equitable powers and in order to do equity and justice for all creditors, it may subordinate claims where claims are obtained through the violation of a fiduciary relationship. The facts of this case as to such violation are indeed aggravated. Mr. Bridgford had been the President, a Director and the principal stockholder of the debtor corporation, and at the time of the violation was one of the Court-appointed Managers. He was in court on November 4, 1949 at the time the Court stated that the debtor was in default under its Plan and that he would order an adjudication. He knew that the debtor corporation was hopelessly insolvent. With knowledge of these facts, he secured an assignment of the Debtor's Certificates from Mr. Hadley without any consideration whatsoever and subject only to Mr. Hadley's verbal suggestion that if any money was secured on these certificates that it should be used for the benefit of those who had invested money in the form of reorganizing the business. He immediately caused a petition to be prepared, together with an Order for the payment to himself of the sum of $25,-996.40 on said certificates, and for the payment to himself of $4,440.00 which he claimed under the Plan of Arrangement. He presented the petition and order to this Court the following Monday, November 7, 1949, without disclosing that he had secured the Debtor's Certificates for nothing, and the Court, assuming that they were entitled to priority, was prevailed upon to sign the Order. This was done without a hearing and without notice or knowledge on the part of creditors or their counsel. Mr. Bridgford, as a court-appointed Manager, immediately drew a check in favor of himself for the

total sum of $30,436.40. He also drew checks for the other amounts set forth in the Order. The following day the Order of Adjudication was entered and the Trustee on qualifying found the munificient sum of approximately $60.00 left in the bank account. These facts, as we have stated, present an aggravated case of over-reaching and abuse of a fiduciary relationship by a Court-appointed fiduciary. Such conduct cannot be condoned. We respectfully submit that since Mr. Bridgford acquired the Certificates of Indebtedness for nothing, it would be inequitable to allow his claim to participate in the distribution of funds which were made available through the processing of foodstuffs for which the farmers and other creditors who produced the same have not been paid. It is the opinion of counsel and the trustee in this matter that to permit such an unjust enrichment to a fiduciary under the facts of this case would be shocking and unconscionable.

We respectfully submit that both Orders of the District Court should be reversed, and the Order of the Referee subordinating Mr. Bridgford's claim be affirmed.

Dated this 7th day of February, 1956.

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No. 14880

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs

HUGH H. BRIDGFORD,

Appellee.

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Printed by San Diego Offset Printing Co. - 133 F Street - BE 2-1528

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

To facilitate a better understanding of the issue here involved it is necessary to supplement and correct the Statement of Facts contained in Appellant's Brief. The material facts in chronological order are as follows:

1. On April 25, 1947, the petition under Chapter XI of the Bankruptcy Act was filed herein by The Bridgford Company. (Transcript of Record p. 3 (hereinafter referred to as R.))

2. On said date of April 25, 1947, and prior thereto Appellee was the president, a director and principal shareholder of The Bridgford Company. (R. p. 177) However at no time after the filing of said petition did Appellee as such president, director or principal shareholder have any connection with or control of the business affairs of The Bridgford Company.

3. On April 25, 1947, the Court assumed control of the assets of The Bridgford Company, appointed M. E. Wagenheim as General Manager of the Company and, through said General Manager, thereafter controlled and conducted the business and affairs of said Company continuously until November 6, 1947. (R. p. 16)

4. On November 6, 1947, the Court appointed R. H. Hadley as General Manager of the Company and, through said General Manager, thereafter controlled and conducted the business and affairs of said Company continuously until February 26, 1948. (R. p. 16)

5. On February 26, 1948, the Court by its

order approved the Plan of Arrangement for the Company and directed that the Company "shall take over its business and assets and operate such business without Court control". (R. p. 26) At that time Mr. Hadley was the Chairman of the Board of Directors and principal shareholder of the Company and he operated and controlled the Company free of court control continuously from February 26, 1948 until November 24, 1948. (R. p. 197)

6. On November 28, 1947, and on January 23, 1948, the Court by its orders authorized the issuance by The Bridgford Company of not to exceed 46 Certificates of Indebtedness for $5,000 each. (R. pp. 19 and 23) All of these Certificates were issued to Mr. Hadley for cash in the face amount thereof loaned by him to the Company. (R. pp. 169-170) At the time both of said orders were made, Mr. Hadley was General Manager of the Company by appointment of Court and was operating the Company's affairs under the Court's control. (R. p. 187) These Certificates, pursuant to the terms thereof, were given priority. (R. p. 22) All of these Certificates were subsequently repaid by the Company except Certificates Numbers 35 to 40, both inclusive, which are the basis of Appellee's claim and are the subject matter of this appeal. At this time there is unpaid the face amount of said Certificates aggregating $30,000 plus interest against which Appellant has an offset against Appellee of $10,996.40.
(R. p. 141)

7. During the period that Mr. Hadley was running the Company free of Court control, to-wit from February 26, 1948, to November 24, 1948, the Company incurred all of the debts (including the debts to the Oregon farmers for produce) which Appellant

asserts should be prior to Appellee's claim on said Certificates of Indebtedness. (R. p. 197)

8. On November 24, 1948, on petition of the Company the Court resumed control of the Company, its business and assets, and appointed Appellee General Manager, later adding two Co-General Managers. (R. 177-178) The Court retained control of the Company through said General Managers continuously thereafter, until the adjudication in bankruptcy was made on November 8, 1949. (R. p. 65)

9. On November 4, 1949, said Certificates Numbers 35 to 40, both inclusive, were transferred and assigned by Mr. Hadley to Mr. Bridgford as a gift. (R. pp. 140 and 166)

10. On February 13, 1953, Appellee filed herein his claim on said Certificates Numbers 35 to 40 in the amount of their face amount, i.e., $30,000 plus interest. (R. p. 96)

11. On November 13, 1953, the Referree allowed said claim of Appellee but subordinated it to the payment of all other claims. (R. p. 118)

12. By orders of Judge Ben Harrison on August 20, 1954, and on May 23, 1955, (R. pp. 138 and 148) said order of the Referree was modified and Appellee's claim was held to be prior over general creditor's and subordinate to expenses of administration and court costs.

THE ISSUE

There is only one issue involved here.

Appellee maintains that said orders of Judge Harrison are correct and that Appellee is entitled to priority on his claim on said Certificates over general creditors, subordinate, however, to expenses of administration and court costs. Appellant contends that Judge Harrison's orders are in error and that Appellee's claim should be subordinate to all other creditors.

IRRELEVANT AND IMMATERIAL MATTERS RAISED BY APPELLANT

Redundantly throughout Appellant's Brief are matters which to Appellee appear irrelevant and immaterial such as the following:

1. The fact that Appellee at one time was the president, a director and principal shareholder of The Bridgford Company, has no bearing on the issue in this case. All of the facts involved herein arose long after he had either lost these positions or they had become stripped of all authority.

2. The fact that Appellee, then one of the Co-Managers of the Debtor in possession, did on November 7, 1949, pursuant to order of the Referee herein, pay a number of expenses of administration including the payment to himself on said Certificates of Indebtedness is immaterial. (R. p. 63) He was later ordered to repay these moneys and he is in compliance with said order as thereafter amended. (R. p. 143) As Judge Harrison states,

> "Any possible misuse of his position by virtue of the fact that he obtained payment for these Certificates with knowledge that the

> "Debtor was about to be adjudicated a bankrupt, was erased by order of the Referee requiring him to pay back the money so obtained". (R. p. 137)

The Referee did not feel that the payment of November 7, 1949, precluded Mr. Bridgford from asserting a claim of priority at the proper time. The Referee in his Order of January 16, 1953, stated in part,

> "It is further ordered that the Findings of Fact and Conclusions of Law and Order heretofore made herein, dated November 17, 1952, are and were made without prejudice to the right of the said Hugh H. Bridgford to claim and assert a priority status and a preference for said claims on said Certificates of Indebtedness* * * *". (R. p. 95)

Therefore, the fact of the payment on November 7, 1949, is moot and closed.

3. The fact that some of the assets of this bankrupt estate may have come from the sale of produce supplied by Oregon farmers for which payment has not been made is immaterial. Appellee states that there is about $100,000 due and unpaid from the Company to these farmers. There is also upwards of $400,000 due to the other creditors including a claim by Mr. Hadley of approximately $119,612.88. There is nothing in the bankruptcy laws that gives farmers as such, any preference over any other general creditors. Furthermore it is incorrect to state, as Appellant does, that Appellee is seeking payment for himself out of funds realized from the sale of the

produce supplied to him by these farmers. In the first place, a substantial part of the assets herein comes from the liquidation of equipment, machinery, etc. (R. pp. 266-267) and, in the second place, all of this produce was sold to the Company by these farmers during the 1948 growing season when Hadley was running the Company and Appellee was entirely out of the picture. (R. p. 197) We are all sympathetic to unpaid creditors whether or not they are farmers. But where, as here, we have approximately $500,000 in general claims, whether Appellee's claim is or is not given priority is not going to have much practical consequence to any creditor except Hadley. Also it should be noted that all of these creditors extended credit in 1948 after Appellee's Certificates were issued and their priority made a matter of public record by order of court. Under these circumstances what basis do they have to blame anyone but themselves if these Certificates are now paid ahead of their claims?

ARGUMENT POINTS AND AUTHORITIES

Appellant, in his Brief, does not dispute the priority status of these Certificates of Indebtedness over general creditors but argues that because of Appellee's fiduciary position, these Certificates in his hands should be subordinated. Appellant on page 27 of his Brief admits that

> "It may be true that had Hadley retained these Certificates he would have been entitled to payment in full".

We therefore deem it proper to proceed in this Brief on the basis that Appellee's claim is admittedly entitled to priority over all general unsecured creditors unless

equity will deny this priority because of Appellee's fiduciary position.

We will now examine this fiduciary position in the light of the facts involved to see what, if any, effect it should have on the issue of priority.

Appellee was a court appointed Co-Manager from November 24, 1948 until November 8, 1949. Admittedly he was, in such capacity, a fiduciary and owed a duty not to secure an advantage by reason thereof. It is submitted that Appellee did not.

These Certificates were issued in February 1948, under court order long before Appellee was appointed. He had nothing to do with their issuance. They were issued for full consideration to Hadley who, himself was then the court's appointed Manager. They were retained by Hadley until November 4, 1949, on which date he made a gift of them to Appellee. On that date Appellee was the court's appointed Manager and Hadley was Chairman of the Board, a Director and the principal shareholder of the Company. Hadley is not complaining. As a matter of fact, Hadley in his testimony of February 1, 1952, several times reaffirmed the gift. (R. pp. 166-167) What right do the general creditors have to complain over this gift? How were they hurt? Why should this gift cause these Certificates to become subordinated thus resulting in a gift or windfall to the general creditors. Appellee merely stepped into Hadley's shoes. As Judge Harrison states,

> "Petitioner (Appellee) has succeeded to the position of his assignor (Hadley) and the fact that he himself gave no consideration for these Certificates is not material. Petitioner

"(Appellee) himself did nothing to detract from the position given to him by his assignor. His duty as a court appointed officer is not violated when he seeks to realize on rights to which he is entitled by valid order of that court." (R. p. 137)

Judge Harrison's conclusion of law covers this point as follows:

"That Petitioner (Appellee) although occupying the position of a fiduciary as to the Bankrupt when he acquired these Certificates, did nothing to detract from the position given to him by H. H. Hadley, his assignor, also a fiduciary as to the Bankrupt and, therefore, Petitioner's (Appellee's) fiduciary position, as aforesaid, does not in any way detract from the rights he might have otherwise had with reference to said Certificates if he had not occupied said fiduciary position." (R. p. 141)

As further stated by Judge Harrison:

"Under these circumstances the position to be afforded his (Appellee's) claim was to be determined solely by the position which the court gave to the Certificates at the time they were issued. The position so given these Certificates, was to be one of priority over existing claims and the integrity of the Certificates and thus this position is to be maintained." (R. p. 137)

Since both parties seem to agree as to the

law and disagree as to its application we want to discuss some of Appellant's citations.

Two important factual differences exist in most of Appellant's cases which make these decisions inapplicable here. In these cited cases there was

1. A trafficking in or purchasing of the debtor's obligations whereas here we have a gift or

2. A dealing in the debtor's assets whereas here we have a debt.

In the case of Bonney vs. Tilley, 109 Cal. 346, cited by Appellant it is stated:

> "It is to be observed, however, that a person who is a creditor of an insolvent corporation is not deprived of any of his rights as creditor by the fact that he also occupies the position of director of the company. He is merely incapacitated as director from using any of the powers of his position for his own benefit or his co-directors."

So it is clear that a fiduciary may acquire and have a valid claim. It is only where he, in some way, uses his power as a fiduciary, either in acquiring or enforcing the payment of the claim, that his fiduciary position in any way affects the validity, the amount or the priority of his claim. He is precluded only from using the powers of his position to gain an advantage. Wherein, in this proceeding, has Appellant made any showing that Appellee used the powers of his position to gain an advantage?

The Van Sweringen Company case, 119 Fed. 2d 231, cited by the Appellant is clearly distinguishable on its facts. In that case, we had fiduciaries trafficking in the securities of the corporation to whom they owed a fiduciary duty and purchasing such securities at less than their real value. This was obviously against and detrimental to the interests of the corporation to whom they owed a fiduciary duty and they were using the knowledge acquired by them in their fiduciary capacity of the real worth of the corporation to purchase securities of the corporation at less than their real value from persons who had no way of knowing their real value.

The case of Meinhard vs. Salmon, 249 N. Y. 458, also cited by Appellant, involves a situation where one partner, representing himself to be the sole owner of a partnership asset, did thereby secretly acquire a personal profit to himself to the exclusion of his partners. Obviously, he thereby violated his fiduciary duty to his partners. Obviously, also, this case is not pertinent to the issues now before this reviewing Court.

The Appellant cites the case of Los Angeles Lumber Products Co., 46 Fed. Supp. 77. It should be noted that this case was cited but not followed in the case of Re Calton Crescent, 173 Fed. 2d 944, discussed later, where the Court reached an entirely different conclusion. The Los Angeles Lumber Products case, in any event, is not in point because it has many distinguishable facts, such as

1. In the Los Angeles Lumber Products case, we have a fiduciary trafficking in the debtor's obligations, which is not involved in our case.

2. In the Los Angeles Lumber Products case,

we have a fiduciary purchasing the debtor's obligations from creditors who were not fiduiaries. In our case, the obligation was given from one fiduciary to another fiduciary.

3. In the Los Angeles Lumber Products case, we have a fiduciary purchasing obligations of the debtor incurred by the debtor in the ordinary course of business. In our case, the obligations involved were incurred pursuant to prior authorization of this Court, not in the ordinary course of business, and expressly made prior in status by order of this Court.

4. In the Los Angeles Lumber Products case, the fiduciary in question was not only a director but also attorney for the debtor and the Court suggests that his activities in acquiring his client's obligations might, even though it did not, preclude him from being entirely without self-interest in handling the legal affairs of the debtor.

Appellant also cites the case of Canton Roll & Machine Co. vs. Rolling Mill Co., 168 Fed. 465, where the fiduciary questioned was an officer of two corporations and he used his position as such officer in one to enable that corporation to gain an unfair advantage over the second corporation, which resulted in a sale of the second corporation's collateral, which he purchased secretly for his own use. This case is clearly not in point.

The only other case on this issue cited by Appellant is the case of Martin vs. Chambers, 214 Fed. 769, wherein the purchase of a corporation's obliga-

tions by an officer was approved and his claim sustained. If the facts were similar to our case, we would cite this case in support of our contention.

The contention of Appellant that this Court has the power to subordinate the claim of Appellee in the event that this Court, in its discretion, determines that the equities of this claim under all the facts and circumstances of this case, so require, is admitted. The existence of this power is elementary.

We would now like to cite and discuss the more recent cases concerning the position of a fiduciary and the status of claims acquired and presented by a fiduciary. The leading recent authority on the subject is the case of Re Calton Crescent, 173 Fed. 2d 944. The facts in that case are briefly as follows:

> Claimants purchased, at less than ten cents on the dollar face value, certain indenture bonds of the debtor during the period that the debtor was insolvent. These purchases were made after a plan of reorganization of the debtor had been effected and before the arrangement proceedings under the Bankruptcy Act had been started. These purchases were from sellers who were not fiduciaries and, in some instances, were made direct and some were made from dealers in over the counter securities. The claims on these debentures in said arrangement proceeding are the subject matter of this case. The claimants were found to be in the same fiduciary capacity as a director of the debtor. The claimants claimed the face amount of the indentures so purchased and the Trustee

objected that the claims should be allowed not in their face amount but in the amount of the purchase price actually paid by claimants.

The court held:

First, that the Federal law, not the State law, determines the extent to which inequitable conduct of the claimant requires subordination of the claim.

Second, that claimant will not be deprived of the profits of his transactions in the debtor's securities on the grounds of their acquisition by use of information acquired as a Fiduciary without adequate disclosure to the Sellers where no complaint of over-reaching is made by the Sellers who had as full information concerning the debtor's financial condition as the claimant.

Third, a director of an insolvent corporation is not precluded from purchasing claims against the corporation at a discount and then collecting the full amount of the claims, at least in the absence of over-reaching of the sellers or other circumstances requiring the imposition of sanctions.

The Court allowed the claims at their face value and without regard to the actual cost thereof to claimants. This decision was affirmed by the Supreme Court of the United States on No. 21, 1949, 338 U. S. 304.

We would like to quote the following excerpts from this case:

"As to the first question the appellant is right--federal law controls the distribution to creditors in bankruptcy. The Supreme Court has declared the rule very definitely. In Prudence Realization Corporation v. Geist, 316 US 89, at page 95, 62 S Ct 978, at page 982, 86 L Ed 1293, the court said; '...The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, Securities and Exchange Commission v. United States Realty & Improvement Co. 310 US 434, 455, 457, 60 S Ct. 1044, 1053, 1054, 84 L Ed 1293, and it is for that court--not without appropriate regard for rights acquired under rules of state law--to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class.'

"Later cases have reiterated the rule. American Surety Co. vs. Sampsell, 327 US 269, 272, 66 S Ct 571, 90 L Ed 663; Heiser v. Woodruff, 327 US 726, 732, 66 S Ct 853, 90 L Ed 970; Vanston Bondholders Protective Committee v. Green, 329 US 156, 161-163, 67 S Ct. 237, 91 L Ed 162. For earlier cases on the general subject, see Pepper v. Litton, 308 US 295, 303-304, 60 S Ct 238, 84 L Ed 281; American United Mut. Life Ins. Co. v. City of Avon Park, 311 US 138, 146, 61 S Ct. 157, 85 L Ed 91, 136 ALR 860. From these decisions we understand the rule to be that, although the state law determines the title, validity and

"amount of a claim, the bankruptcy law, including what federal judges think to be equitable, determines what dividends shall be distributable to the claimant. In other words, in addition to those modifications which the Bankruptcy Act itself has imposed upon distribution with respect to preferences, priorities and the like, the courts must impose any other modifications which they deem necessary in the interest of justice."

. . . . . .

"It is, of course, axiomatic that a fiduciary will not be permitted to profit at the expense of his cestui from any transaction where his fiduciary duty and his personal interest may come into conflict. This principle, however, does not preclude a director from purchasing a claim at a discount and collecting its face amount, if his company is solvent, since who holds the debt can be of no concern to a solvent company. It is not immediately apparent why insolvency should make a difference. It will cost the debtor no more whether the dividend which it may be able to pay creditors goes to the original holder of the debt or to a director-assignee. Counsel for the Securities and Exchange Commission suggests that insolvency creates a possible conflict between duty and personal interest because the directors can choose the time for filing a bankruptcy petition and may accelerate or postpone it if doing so can result in a personal profit. The argument as to the timing of bankruptcy has no force after the petition has been filed, yet the law is better settled with respect to

"purchases made after the petition is filed than those made before. After insolvency it may be said that the directors are fiduciaries for the group of creditors who will share in the insolvent's estate. But the creditors who have retained their claims will suffer nothing whether or not the director is allowed to make a profit from his purchases. If a wrong has been done to any of the group of cestuis, it is to those who sold their claims at a price less than the dividend they would have received had they retained them. If they were suing for the wrong done them, they would have to show something equivalent to a fraudulent non-disclosure. Strong v. Repide, 213 US 419, 29 S Ct 521, 53 L ed 853. Plainly if the contest for the director's profits was between the wronged cestuis and the unwronged cestuis, the former should prevail. Where it is between the unwronged cestuis and a director, if the former are allowed to prevail it can only be as a disciplinary measure against the director for wronging someone who has not complained of the wrong. That this is the real basis for the rule was recognized by Judge Kirkpatrick in the case of In re Real Estate Mortgage Guaranty Co. DCED Pa, 55 F Supp 749, 752, where he said: '... The doctrine that a receiver may not retain a personal profit made out of his trust is a prophylactic rule. It implements the law's precept that a trustee must give undivided loyalty to his trust. The surcharge is the sanction.... In the present case a substantial majority of the ultimate and only beneficiaries of the trust, knew of and consented to the receivers earning these commissions

"by placing the insurance through his own agency. I think that is a controlling factor and that it gives the court full discretion to deny the surcharge.'

"The same judge made a similar statement in Re Philadelphia & Western Ry. Co., DC, 64 F Supp 738, 741: 'This limitation is not imposed upon the theory that such profits belong to the corporation by reason of any property right that it may have in them but is an administrative sanction for the enforcement of the rules of fiduciary conduct set by the law.' If the doctrine be recognized as a disciplinary sanction within the discretion of the court to impose or withhold, then, as Judge Kirkpatrick also said in the Mortgage Guaranty Co. case, 'Each case depends on its own circumstances'. In the case at bar, where there was no overreaching of the sellers, we are not convinced that the circumstances are such as to require imposition of the sanction, even if the proof of debt had been filed by a director of the debtor."

It is interesting to note that Judge L. Hand agreed with the majority on the proposition that the federal law controls on the question of the extent to which inequitable conduct of claimant requires the subordination of the claim and not the State law. It is also interesting to note that while Judge Hand felt that the claimants should be allowed claims in the amount of the purchase price paid by them since they purchased from non-fiduciaries, that if the claims had been purchased by a director from a director, he would have agreed with the majority and allowed the

claims at the face amount thereof rather than at the purchase price paid by claimants. Referring to a purchase by a director from a director, he said:

"Surely they stand on an equality".

We submit that the standing of Appellee in this case is far superior by reason of several distinguishing facts to the position of the claimants in the Re Calton Crescent case. Appellee's claim was acquired from an equal fiduciary. Appellee did not purchase or traffic in the open market. Appellee acquired by gift. The claims in the Re Calton Crescent Case were based on obligations incurred by the debtor in the normal course of its business while Appellee's claim is based on an obligation authorized and expressly made prior in status by order of this court.

We do not deem it necessary to expand this brief with further citations on this issue since the subject has been very completely covered, replete with citations, in an excellent recent article in American Law Reports, 13 ALR 2d, page 1172.

CONCLUSIONS

The priority status of this claim on the Certificates of Indebtedness is admitted--in the absence of inequities.

So we come to the only question in this case. Are there any equities which require the subordination of these Certificates? We submit that there are none because:

1. These Certificates were originally issued

for a full cash consideration and given a prior status at time of issuance by Order of the Referee herein.

2. These Certificates were orginally issued to Mr. Hadley, a Fiduciary, and by him, while still a Fiduciary, given to Appellee.

3. Mr. Hadley has re-affirmed the gift and makes no complaint to this claim as a claim entitled to priority.

4. There was no trafficking in these Certificates. They were acquired by gift.

5. Appellee neither sought nor gained any advantage by reason of his Fiduciary capacity.

6. No one to whom Appellee owed a Fiduciary duty was harmed or in any was affected by his acquisition of these Certificates. The position of all parties involved remains unchanged except that Appellee has stepped into Mr. Hadley's shoes as the owner of these Certificates.

We respectfully submit that the claim of Appellee is just and equitable and that the Orders of the District Court should be affirmed.

Respectfully submitted,

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NO. 14880

United States
Court of Appeals
For the Ninth Circuit

In the Matter of
The Bridgford Company, a Corporation,
Bankrupt.
Paul W. Sampsell, Trustee in Bankruptcy for the Estate of The Bridgford Company, a Corporation, Bankrupt,
Appellant,

vs.

Hugh H. Bridgford,
Appellee.

BRIEF OF OREGON FARMER CREDITORS

P. J. Gallagher
Gallagher Building
Ontario, Oregon

FILED
MAR 26 1956
PAUL P. O'BRIEN, CLERK

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BRIEF OF OREGON FARMER CREDITORS

FOREWORD

This Court has permitted certain creditors (hereinafter referred to as Oregon Farmers) of the Bridgford Company, a bankrupt corporation, to file a brief in this proceeding as appellants. These creditors who were granted this privilege are farmers who reside in the vicinity of Ontario, Oregon, and who during

the crop season of 1948, produced, sold, and delivered to the Court appointed managers of the Bridgford Company, at its food processing plant at Ontario, Oregon, agricultural products which were processed by the Company during the season of 1948 and for which there is an unpaid balance due these farmers of approximately $100,000.00.

Creditors claims were timely filed by each of the individual farmers.

OPENING STATEMENT

Agreeing with, but supplementing the opening statement contained in the brief of appellant Sampsell, we point out that on April 25, 1947, the bankrupt filed a voluntary petition in the United States District Court for the Southern District of California, Southern Division, seeking relief under Chapter XI of the Bankruptcy Act.

The debtor remained in possession under the plan of arrangement. Mr. Bridgford, the President of the bankrupt corporation, was also one of the Court appointed managers to operate the Company's facilities for the purchase of the 1948 crop of products which was delivered to the Ontario plant and processed during the 1948 processing season and disposed of by the managers for the benefit of the bankrupt estate but was not fully paid for, leaving unsatisfied claims of approximately $100,000.00. (Referee's Findings XII R-115)

During the operation of the bankrupt estate one R.

Harold Hadley became a creditor of said estate in the principal sum of $30,000.00 and received Certificates of Indebtedness Nos. 35 to 40 inclusive, for that amount.

Hadley did not file a claim with the Referee, or present these Certificates for payment, but assigned the above described Certificates to the appellee, Hugh H. Bridgford, without any consideration, on or about November 7, 1949, whereupon Bridgford filed a claim for the face value of the Certificates (Referee's Findings No. III R-111) although he admitted he didn't pay Hadley anything for the Certificates (R-178) and further admitted that upon receiving the proceeds of the check for $25,996.40 "It was commingled with my personal funds, and has been used and spent" (R-183) and that the money was not used to pay "any old obligations of the Bridgford Company." (R-183)

Appellant Sampsell's opening brief details fully the nature of the claim filed by Bridgford and its history leading up to this appeal (pp. 4-6 Sampsell's brief) with appropriate references to the record and these matters will not be repeated here. Neither will we make any further reference to the procedural steps taken by appellant Sampsell.

ARGUMENT POINTS AND AUTHORITIES

I

Appellee, being a fiduciary, a court appointed manager under the plan, and an officer of the Court,

could not take advantage of his knowledge of the affairs of the bankrupt estate to obtain a personal advantage and profit.

> **Donovan & Schuenke vs. Sampsell,** 226 F. (2) 804.

ARGUMENT

Having been the principal stockholder, director and officer (president) of his bankrupt corporation, and a Court appointed manager under Chapter XI, the appellee was well aware of the financial condition of the bankrupt estate, he was also well aware of how, and under what circumstances, Mr. Hadley acquired the Certificates of Indebtedness. He was in open court on November 4, 1949, when the referee announced from the bench "that he found the debtor in default and would order an adjudication." (Referee's Findings VI and VII, R-113). He also knew that the funds then under his control were the proceeds of the sale of products bought from the Oregon Farmers and that they had not been fully paid. (R-196)

When on November 7, 1949, he presented a petition to Referee Lannon for authority to pay himself the face value of the Certificates of Indebtedness, he failed to inform Judge Lannon that he took these Certificates without any consideration (R-212) or as Bridgford himself put it (R-178) "the Certificates were received with no strings attached."

We think a mere recital of the admitted facts as

outlined in the record, would compel a reversal of the decree appealed from. If authority be necessary such authority is found in the cases cited in appellant Sampsell's brief, all of which are adopted but for the sake of brevity shall not repeat, except to call attention to parts of the opinion in **Donovan & Schuenke vs. Sampsell** (226 F. (2) 804) omitted in appellant Sampsell's brief. We read in the Donovan opinion (226 Fed. (2)) at 807:

> "The duties of these corporate officers were to protect the creditors of Ridgecrest."

And further from the same page of the opinion:

> "Fiduciary obligations are imposed upon corporate officers of a concern which is insolvent. They cannot buy claims against it, deal in its stock or traffic in its property. The courts refused profit on or set aside such transactions even where bankruptcy has not intervened.
>
> 'The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them.' Bramblet v. Commonwealth Land & Lumber Co. 83 S.W. 599, 602, 26 Ky. Law. Rep. 1176, 1179.
> And the intervention of bankruptcy does not terminate his responsibility as an officer of the corporation. Even if the relationship had ended, the fiduciary capacity was not lost."

The basis of invalidity of the fiduciaries acts in the Donovan case are pale indeed compared to the studied, and deliberate acts of infidelity found in the present record where the appellee procured the trust funds to pay his individual claim without informing the Referee that he had obtained the Certificates of Indebtedness from Hadley without consideration of any kind. (R-178)

When Bridgford bought the products from the farmers he reflected the integrity of a Federal Court. It is doubtful if these farmers would have sold their products to a Company teetering on the brink of insolvency unless they felt they had the assurance of fair and honest supervision and accounting controlled by a Federal Court.

These farmers were not selling to the Bridgford Company, against the defaults of which they could protect themselves by suit and attachment in a local court, but to court appointed managers of a Company then under the control of a United States Federal Court and the farmers felt they had security against the rapacity of these self-same managers who were under the control of the court who appointed them its agents. After all, any prospect of success that the Bridgford Company (and its stockholders) might hope for depended upon the money and labor of these farmers and assuming that they would have a fair run for their efforts and contributions, they were willing to go along towards helping Bridgford salvage his company from a self-inflicted financial crisis.

Under the situation above detailed we heartily

agree with the pointed observation of Referee Lannon (R-84) where he said:

> "It would indeed be an anomalous and inequitable situation to permit Mr. Bridgford to secure a priority payment in the amount of $30,436.40 out of funds realized from the sale of produce grown by the Oregon farmers, and then leave the farmers and other creditors holding the proverbial 'bag' to the extent of more than $100,000.00 representing unpaid claims for that produce."

APPELLEE BRIDGFORD HAD THE DUTY TO INFORM THE REFEREE THAT HE RECEIVED AN ASSIGNMENT OF THE CERTIFICATES OF INDEBTEDNESS WITHOUT CONSIDERATION.

Occupying a fiduciary relationship as Bridgford was, not only prohibited him from asserting a claim in his own right for which he paid nothing, but he had a duty to inform the Referee that such a claim if presented by another party was fraudulent.

In a very recent case reported as **Larson Company vs. Wallingsford,** 136 Fed. Sup. 602, after calling attention to various sections of the Bankruptcy Act, which specify the duties of a bankrupt to assist the trustee the court wrote: (611)

> "These clauses rarely have been construed, but the duty of the bankrupt to inform the trustee of all false claims coming to his knowledge persists until he is discharged or until the final clos-

> ing of administration, if discharge is granted sooner. 'The bankrupt also has sufficient standing to move to expunge a false claim, although where there is a trustee the latter, as the representative of all the creditors, should do this.' "

In Sec. 7.25, page 1014, of the same volume, the learned author says:

> "Subdivision b of Sec. 7 was added by the Act of 1938 to clarify the question as to who must perform the duties prescribed by Sec. 7 where the bankrupt is a corporation. The subdivision provides that in such situations, the bankrupt's 'officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders, or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act.' "

In Goldie v. Cox, 8 Cir., 130 F 2d 690, the court at page 695 said:

> "The Bankruptcy Act recognizes the necessity of assistance from the bankrupt to the trustee and creditors * * * . Where the bankrupt is a corporation, this same situation applies to officers and directors thereof."

Citing Crutcher v. Logan, 5 Cir., 102 F. 2nd said:

"The successful administration of a bankruptcy estate, of necessity requires cooperation and assistance from the bankrupt, and where, as here, the bankrupt is a corporation the assistance must come from the officers and persons employed by the corporation prior to its bankruptcy. The officers should disclose all information which they have concerning the bankrupt's affairs."

THE REFEREE, AND THE COURT, HAS POWER TO RE-EXAMINE AND SET ASIDE AN ALLOWED CLAIM AT ANY TIME DURING THE PENDENCY OF THE CAUSE.

Even if the Referee allowed Bridgford's claim based on the certificates of indebtedness in the first instance the Referee and the Court, has the power to re-examine for the purpose of determining the validity of the claim and determine the order of its payment.

In 8 C.J.S. (Bankruptcy) 1117 we read:

"At any rate, practically any matter or cause which appears to render the original order erroneous or improper will afford a sufficient ground for its re-examination."

In **Jones vs. Clower** 22 Fed. (2) 104 in a case where a duplicate claim was allowed, and later set aside and expunged, the 5th Circuit held: (106)

> "The Bankruptcy Act invests courts of bankruptcy with jurisdiction to 'allow claims, disallow claims, reconsider allowed or disallowed claims, or allow or disallow them against bankrupt estates,' and provides that 'claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.' Sections 2 (2), 57k (11 USCA §§11, 93(k). The quoted provisions fully empower a bankruptcy court to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based. Lesser v. Gray, 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 571."

The foregoing language is amplified in **Lesser v. Gray** 236 U. S. 70, 35 S. Ct. 227, 59 L. E. 471 where we read: (474)

> "Section 2 of the bankruptcy law (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), invests courts of bankruptcy with jurisdiction to '(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estate; . . . * * * (10) consider and confirm, modify, or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically

provided for as may be necessary for the enforcement of the provisions of this act.' "

Based on the undisputed facts in this record and the unanimous holdings of the courts the present case should be reversed.

To hold otherwise, would be to license fiduciary officers of a Federal Court in bankruptcy cases, to plunder creditors that have been imposed upon because of the standing obtained from the fiduciary capacity bestowed upon them by courts of the United States.

Respectfully submitted,
P. J. Gallagher,
Attorney for Oregon farmer creditors.

No. 14880

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
THE BRIDGFORD COMPANY, a Corporation, Bankrupt.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of The Bridgford Company, a Corporation, Bankrupt,

Appellant,

vs.

HUGH H. BRIDGFORD,

Appellee.

APPELLEE'S BRIEF IN REPLY TO BRIEF OF OREGON FARMER CREDITORS

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FILED
APR - 2 1956
PAUL P. O'BRIEN, CLERK

Printed by San Diego Offset Printing Co. - 133 F Street - BE 2-1528

No. 14880

IN THE

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FOR THE NINTH CIRCUIT

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Appellee.

APPELLEE'S BRIEF IN REPLY TO BRIEF OF OREGON FARMER CREDITORS

THE FACTS

Pursuant to permission of this Court, the Oregon Farmer Creditors have filed a Brief herein "as appellants". This brief requires answering by Appellee because it is predicated entirely upon a five-times repeated material mis-statement of fact.

The Oregon Farmer Creditors on whose behalf this brief was filed are farmers who produced, sold and delivered crops to The Bridgford Company during the crop season of 1948. Without citing any references to the record, this brief at two places on page 2 thereof and at three places on page 6 thereof recites that these 1948 crops were sold and delivered to the Court appointed managers of The Bridgford Company. This is not true. These 1948 crops were sold and delivered to The Bridgford Company during the period that the Company had possession of its assets and was operating its business completely free and clear of Court control. There was no Court appointed manager during the period these 1948 crops were sold by these farmers.

On February 26, 1948, the Court, by its order, approved the Plan of Arrangement and directed that The Bridgford Company "shall take over its business and assets and operate such business without Court control". (R. p. 26) At that time Mr. Harold H. Hadley was the Chairman of the Board of Directors and principal shareholder of the Company and, as such, he operated and controlled the Company continuously from February 26, 1948 to November 24, 1948, free and clear of any control by Appellee, the Court, or anybody else. (R. p. 197 and 198) These facts

cannot be controverted.

Respectfully submitted,

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By Robert A. Oakes
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No. 14880

United States Court of Appeals

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PETITION FOR REHEARING

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FILED
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PAUL P. O'BRIEN, CLERK

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PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND TO THE JUDGES THEREOF:

Appellee in the above-entitled cause presents this his petition for rehearing of the above-entitled cause and in support thereof respectfully shows:

I

THE APPELLEE, HUGH H. BRIDGFORD, DID NOT BREACH HIS TRUST.

In what respect is the Appellee in receipt of any "ill-gotten" gains, as claimed by Appellant?

One group of authorities holds that a trustee cannot buy a claim against his beneficiary at a discount and secure the full value thereof from the beneficiary. Wickersham v. Crittendon, 93 Cal. 17; Matter of the Van Sweringen Company, 119 F. 2d 231 (C.A. 6th).

Another group of authorities holds that a trustee is guilty of breach of trust when he deals with trust

property, that a loyal trustee must not permit the possibility of his assuming an interest adverse to that of his trust; that he must not seek a personal profit in dealing with the subject of his trust. Pepper v. Litton, 308 U.S. 295; Donovan & Schuenke, et al. v. Sampsell as Trustee, et al., 226 F. 2d 804; Los Angeles Lumber Products Co., 46 Fed. Supp. 77.

The language used in the Los Angeles Lumber Products Co. case, and in many other cases, appears to stand for the general proposition that a trustee must not only exercise the highest fidelity toward the beneficiaries, but must not permit himself to be in a position in which such faith may be jeopardized.

There is nothing in the entire record of this case which indicates that the Appellee was ever in a position in any way adverse to the best interests of the beneficiaries of his trust. He did not deal in the

subject matter of the trust. The debtor's certificates represented a liability of the debtor in possession, not an asset. The certificates were not a subject matter of the trust.

Appellee did not deal in or with the obligations of the debtor in possession. He did not use his position to gain an advantage over the beneficiaries of the trust.

The record indicates that valid and subsisting obligations of the debtor in possession were given to Appellee. The concept of a gift is practically the antithesis of the concept of dealing in a commercial transaction. When a gift is made, business as such is not being transacted. It is commonplace for the executor of a decedent's estate to also be a donee. The fact that the executor does not take the affirmative action of disclaiming the gift which he receives does not taint him with dishonesty. If Appellee had gone into the open

market and had used his business ability to buy the certificates at a discount, he would be in violation of his trust.

The general duty of a trustee is well defined in the Restatement, Trusts #201. "A breach of trust is a violation by the trustee of any duty which as a trustee he owes to the beneficiary." This duty certainly does not, however, require that the trustee surrender all of his property rights to the cestuis que trust. All they are entitled to is the subject matter of the trust and all of the rights, privileges, and benefits legitimately flowing therefrom. It must be kept in mind that they did receive the benefit of the money for which the certificates were issued.

II

WHAT IS THE DUTY OF A TRUSTEE?

It does not seem reasonable to hold that a trustee

is under a duty to disclaim a gift because such gift is an obligation of the beneficiary or of the trustor. A debt is not a trust. (Restatement, Trusts, #12).

The rule prohibiting a trustee from acquiring an interest adverse to a beneficiary does not apply where the interest is not a forseen or foreseeable consequence of the employment. Burns v. Clark, 133 Cal. 634.

> "If the trustee enters into a transaction not connected with the administration of the trust, he is not accountable for a profit which may result merely because the trust property is indirectly affected thereby." (Restatement, Trusts, #203 e).

Furthermore, the trustor, or beneficiary, can only assert ownership of the interest of the trustee where bad faith of the trustee is shown. Snedeker v.

Ayers, 146 Cal. 407.

Hugh Bridgford did not acquire these certificates because of knowledge gained through his office as manager of the debtor in possession. They were given to him. The transfer was voluntary. The duty of the Appellee to the debtor in possession and the creditors had nothing to do with the transfer. His position is no different than if he acquired them by inheritance. Would Appellant be entitled to a windfall of $30,000.00 by reason of such a bequest?

It is well established that a trustee may also be a beneficiary of the trust. (54 Am. Jur. 102). Indeed it is commonplace for an individual executor to be a beneficiary. The authorities cite no instance in which a Court has held that an executor could not be the donee of a legatee.

Could R. H. Hadley have given the Appellee an

automobile or any sum of money which Appellee could have lawfully kept as against the claim of Appellant? The duty of a trustee does not proscribe his acceptance of a gift, unless the gift be designed to influence his judgment against the best interests of the beneficiary.

If Hadley had cashed in the certificates and given the proceeds, or even a portion thereof to Appellee, could Appellant have claimed them as against Appellee?

An answer in the affirmative would seem to require a trustee to grant all of his future pecuniary gains to the beneficiaries, irrespective of the source thereof, so long as the trust continues.

> "A trustee is entitled to reimbursement for his proper outlays, and it has been said that the doctrine that trustees must be deprived of all profits made by them out of trust funds must not be pushed too far, lest it 'should inspire

"'dread of all trusts and drive honest men from their acceptance.' Although a trustee generally is not entitled to retain a bonus or gratuity received from a third person as a consequence of his administration of the trust, under some circumstances a trustee has been permitted to retain a bonus or gratuity received from a third person. A trustee has also been permitted to retain compensation received by him as a director or officer in a corporation, where stock that he held in the corporation belonged to the trust estate." (54 Am. Jur. 249, 250).

A trustee may take part in a transaction concerning the trust if done in good faith and without any purpose of fraud. Snedeker v. Ayers, 146 Cal. 407.

III

THE DONOR, R. H. HADLEY, HAD A RIGHT TO DISPOSE OF THE CERTIFICATES AS HE SAW FIT.

Counsel for Appellant in his argument before this Court flatly stated that the certificates would be entitled to the priority accorded them by the United States District Court, had they been presented for payment by R. H. Hadley.

The certificates were valuable property rights belonging to Hadley, the assignor. The certificates were valid and the owner thereof had a right to use them or dispose of them as he saw fit. In disposing of them as he did, he wished to confer a benefit upon the Appellee. There is no indication whatsoever that he desired or intended to benefit the debtor in possession or its creditors. A donor is entitled to select the object of his generosity. To hold that this gift now inures to the

benefit of the creditors of the bankrupt rather than to the Appellee would defeat the purpose of the donor and destroy the right under the law which he has to select the donee of the gift. Such a holding would circumscribe and place a limitation upon property rights which finds no authority under the law.

If Appellee had secured the certificates by fraud, presumably his assignor could secure a judgment setting aside the assignment, and present them for payment. This, however, has not been attempted. In fact Hadley reaffirmed the gift in his testimony before the Referee.

IV

THESE CERTIFICATES WERE ENTITLED TO PRIORITY IN HADLEY'S HANDS AND THIS PRIOR STATUS WAS NOT LOST BY THE GIFT.

Appellee is unable to reconcile the statements of this Honorable Court in its opinion with reference to the priority status or value of these Certificates in Mr.

Hadley's hands. In one place in the opinion, it is stated:

> "The claim which on a Friday was worthless in the hands of the owner ****"

On the other hand, the opinion also states:

> "There is no need to consider **** the status of the Certificates had they been retained by Hadley *** ".

The priority status of these Certificates and their value in Mr. Hadley's hands has never been questioned by Appellant. Appellant, in his Briefs in the lower Courts, admitted that these Certificates in Hadley's hands were entitled to full payment. Counsel for Appellant in his argument before this Court re-affirmed this admission. This issue, being thus admitted, was not even briefed by Appellee in his Brief filed in this Court.

The opinion of this Honorable Court has the result of holding that these Certificates, purchased for full value by Hadley, a Fiduciary, and having a priority status entitled to full payment, completely lost this priority and value when given by Hadley to Mr. Bridgford, solely because Mr. Bridgford was also a Fiduciary. This, it is submitted, is not sound law, and Appellee respectfully suggests that this result is obtained because of the failure of this Court to appreciate that the priority status and value of these Certificates in Mr. Hadley's hands was admitted and was not a contested issue before this Court.

For the reasons stated above petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed, and the judgment

No. 14881

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Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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FILED
DEC

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Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a Judgment of the District Court in favor of defendant. (Tr. of Rec., P. 28) Jurisdiction below arose under Section 10 of the Administrative Procedure Act, 5 U. S. Code Sec. 1009. Jurisdiction of this court is conferred by 28 U. S. Code Sec. 1291.

STATEMENT OF THE CASE

Appellant is a native and citizen of Mexico who legally ıtered this Country in 1919 and has remained in the United ates continually since that time. On September 1, 1953, a arrant of arrest was issued by the District Director of the ımigration and Naturalization Service charging that appellant as subject to deportation under the Immigration and ationality Act of 1952 because appellant had been a member the Communist Party after entry into the United States. id warrant of arrest was served on October 14, 1953, and arings on the charge were begun on October 17, 1953.

At the deportation hearing appellant objected to being vorn as a witness prior to the introduction of the evidence the Immigration Service. (S. R. 6) When appellant's unsel was asked whether or not he also advised the pellant not to testify in the proceedings, appellant's torney answered "I do so, Mr. Special Inquiry Officer, this time. I will reserve further advice until after I ar the evidence that the Government has to introduce." . R. 6) Appellant also objected to the deportation hearing the grounds that the statute under which the hearings were ing conducted violated the First Amendment, the Fifth, nth and Tenth Amendments to the Constitution as well as e prohibition against ex post facto legislation and bills of tainder (S. R. 7, 8). Two Government witnesses testified

at the hearing that the appellant was a member of the Communist Party; each testified as to different periods of time. Neither corroborated the testimony of the other, nor were documents of Communist Party membership introduced to support the testimony of either witness. Motions were made to strike the testimony of the witnesses and to dismiss the proceedings, but said motions were denied. (S. R. 100 & 101)

The Special Inquiry Officer, in a decision dated December 17, 1953, found that there was reasonable, substantial and probative evidence to support the finding that appellant was a member of the Communist Party from 1939 to 1942 and during part of 1949 and 1950 and ordered the deportation of appellant. The Board of Immigration Appeals, in a decision dated June 16, 1954, dismissed appellant's appeal, stating that the testimony of the two witnesses constituted "probative, reasonable, relevant and substantial evidence establishing the respondent's membership in the Communist Party of the United States." The Board of Immigration Appeals further agreed with the Special Inquiry Officer that the finding of the Special Inquiry Officer was "buttressed by the respondent's refusal to testify, on the grounds that where, as here, there was a duty to speak, silence is evidence of a most persuasive character".

On July 28, 1954, appellant filed a complaint in the

court below for an injunction preventing the Immigration and Naturalization Service from deporting him and requesting a declaratory judgment that the order for deportation was void and of no effect on the grounds that the deportation proceedings were not supported by reasonable, substantive and probative evidence and based upon incompetent evidence, that the order was entered without observance of due process and that the Administrative Procedure Act was violated, and that the Immigration and Nationality Act of 1952 was void on its face and as applied because it was in contravention of the First, Fifth, Ninth and Tenth amendments of the United States Constitution and because it constituted ex post facto legislation and a bill of attainder.

SPECIFICATION OF ERRORS

(1) Finding of Fact IX (Tr. of Rec. P. 32) is erroneous in that the only evidence to support the order of deportation is based upon testimony which is incompetent and which was hearsay and which was not the best evidence and which was coupled with the fact that an inference wrongfully was drawn from appellant's refusal to testify at the deportation proceedings when the burden of proof in said proceedings was on the Immigration and Naturalization Service. Said evidence was not reasonable, substantial, and probative.

(2) Finding of Fact VIII (Tr. of Rec. P. 32) is erroneous in that the Special Inquiry Officer had no jurisdiction because he was not appointed, qualified or assigned pursuant to Section 11 of the Administrative Procedure Act. (Finding of Fact VI, Tr. of Rec. P. 32.)

(3) Finding of Fact X (Tr. of Rec. P. 32) is erroneous in that the Immigration and Nationality Act of 1952 is void on its face and as applied because it violates the First, Fifth, Ninth and Tenth Amendments of the United States Constitution and in the instant case constitutes ex post facto legislation, and is a bill of attainder.

SUMMARY OF ARGUMENT

The testimony of the two witnesses falls short of constituting reasonable, substantial and probative evidence as required by statute and the finding that appellant was a member of the Communist Party rests in part upon an inference wrongfully drawn from his silence at the deportation proceedings. No documentary evidence was introduced to support the charge and when the record is viewed as a whole, there is insufficient evidence to support the finding of Communist Party membership.

Appellant was entitled to a hearing before an officer appointed, qualified and assigned under the terms of the Administrative Procedure Act as well as to other procedural

guaranties provided by that Act.

Finally, the statute involved on its face and as applied denied appellant procedural and substantive due process of law, and is an ex post facto law and a bill of attainder as well as limiting appellant's rights to speech and association contrary to the First and Fifth Amendments.

ARGUMENT

1. THE FINDING THAT APPELLANT IS SUBJECT TO DEPORTATION BECAUSE HE WAS A MEMBER OF THE COMMUNIST PARTY IS NOT SUPPORTED BY REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE AS REQUIRED BY THE 1952 IMMIGRATION AND NATIONALITY ACT.

(A) STANDARD OF PROOF REQUIRED.

Section 242 (b) (4) of the Immigration and Nationality Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence". Although Section 10(e) of the Administrative Procedure Act provides for a similar standard of proof, this standard is new in deportation statutes and was incorporated for the first time in the Immigration and Nationality

ıct of 1952.

The phrase "substantial evidence" has been defined s "more than a mere scintilla". It means such relevant vidence as a reasonable mind might accept as adequate to upport a conclusion. Consolidated Edison Company vs. . L. R. B., 305 U. S. 197, 229. The evidence "must do ıore than create a suspicion of the existence of the fact to e established . . . it must be enough to justify, if the trial ere to a jury, a refusal to direct a verdict when the onclusion sought to be drawn from it is one of fact for the ury". N. L. R. B. vs. Columbian Enameling and Stamping ompany, 306 U. S. 292, 300.

When faced with similar language concerning the tandard of proof regarding cases before the National Labor elations Board, the Supreme Court clarified the nature of ıe standard of proof required and the burden placed upon eviewing courts.

"It is fair to say that in all this Congress expressed mood. And it expressed its mood not merely by oratory ut by legislation. As legislation that mood must be espected, even though it can only serve as a standard for udgment and not as a body of rigid rule assuring sameness f application. Enforcement of such broad standards implies ubtlety of mind and solidity of judgment. But it is not for s to question that Congress may assume such qualities in he federal judiciary . . . Congress has left no room for

oubt as to the kind of scrutiny which a court of appeals nust give the record before the Board to satisfy itself that ne Board's order rests on adequate proof." Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, 487.

(B) EVIDENCE INTRODUCED.

The finding of fact that the appellant voluntarily was member of the Communist Party of the United States from 939 to 1942 and during part of 1949 and 1950 rests upon the estimony of the two Government informants who testified s to different periods of time of the alleged membership.

The first witness, Louis Rosser, testified that he ad been present at four meetings attended by the appellant rom 1939 to 1942, which meetings Rosser stated were Communist meetings. When asked whether or not he had ersonally called these meetings or invited persons to ttend them, Rosser stated that he did neither of these hings. (S. R. 23, 66-76, 80 and 88.)

Rosser further testified that he and the appellant worked together in the unemployed movement on demonstra- ions, grievance committees, delegations to the relief eadquarters of the State, of the County, we went to all ypes of sections of the County, Belvedere, Inglewood, roblems and so the only thing I saw him doing was working laily in the unemployed movement . . . ". (S. R. 28) Rosser

further stated that he knew the plaintiff as a Communist from their day to day work in the Workers Alliance but on cross examination (S. R. 66, 68), he testified that many non-Communists were members and active in the Workers Alliance. He also said that many meetings attended by non-Communists were held at the Workers Alliance headquarters where Communist Party meetings which the appellant allegedly attended, were held. And when asked whether or not any of the people Rosser termed Communist co-workers in the Workers Alliance ever told him that they were members of the Communist Party his answer was "No" (S. R. P. 68).

Rosser admitted that when applying for admission to U. C. L. A. he had stated that he had formerly attended Phoenix J. C. (S. R. 45), but he also testified that other than attendance at U. C. L. A. and Sacramento J. C. in 1925 he had no further education since leaving high school (S. R. 44). Further contradictions concerning Rosser's educational background are contained in the record (S. R. 34-54) as well as an admission that while in attendance at U. C. L. A. Rosser agreed to have others take his examinations for him. (S. R. 95) Further, Rosser testified to a series of arrests and convictions for various charges involving moral turpitude (S. R. 91, 92).

No corroborating evidence of any kind was offered to support the testimony of Rosser nor were any documents

indicating Communist Party membership of the appellant introduced at the deportation hearing. Appellant moved to strike the testimony of Rosser as to appellant's membership in the Communist Party and attendance at Communist Party meetings on the grounds that the testimony was not the best evidence as to Communist Party membership and was hearsay but said motion was denied. (S. R. 100). Appellant further moved to strike Rosser's testimony entirely as being incompetent and of no probative value but said motion also was denied (S. R. 101).

The second and last witness who testified that appellant was a member of the Communist Party was Daniel Scarletto who stated that he had attended Communist Party meetings with the appellant. But Scarletto's testimony also was replete with contradictions. He first testified that the appellant was "present at several meetings I attended" (S. R. 106). But later Scarletto testified that appellant was present at "fifteen or twenty that I can remember" (S. R. 107). Further, Scarletto testified that he collected Communist Party dues from the appellant on "four or five occasions" (S. R. 107) but later testified when asked on cross examination on how many different occasions did Mr. Ocon pay dues to him, "Oh, I would say about ten different occasions" (S. R. 127). And again, when asked whether or not he was incorrect when he previously stated that he collected dues on four or five occasions, Scarletto

answered "I might have got that a little mixed up there, we wrangled it back and forth, but it was on several occasions" (S. R. 128).

Scarletto's testimony contains other instances of disregard for the truth. He had testified that he went into the Communist Party at the suggestion of an FBI agent. He was asked whether or not he knew the agent before 1947 and stated "No" (S. R. 114). When then asked whether or not the agent sought him out, Scarletto's answer was "Oh, I knew him before '47. I knew him in '46" (S. R. 114). Scarletto also testified that he was employed by Lockheed Aircraft Corporation during the course of his membership in the Communist Party and indicated on his employment application that he was not a Communist (S. R. 112). Further, when asked whether or not at the time of his recruitment to the Communist Party he truthfully answered a question as to whether or not he knew any FBI agents, Scarletto stated "Well, that would be kind of stupid, wouldn't it?" (S. R. 117).

At the conclusion of Scarletto's testimony, appellant moved to dismiss the proceedings because the entire evidence offered by the Immigration Service was incompetent but said motion was denied (S. R. 136).

Although both witnesses testified that appellant had attended "Communist meetings", the first witness admitted that he personally had no part in the calling of

these meetings or inviting persons to attend them and it is therefore obvious that he had no personal knowledge that these meetings were in fact restricted solely to members of the Communist Party. Nor is there any testimony in the record that the second witness called any meetings or invited persons to attend the alleged Communist Party meetings that he stated appellant attended. The value of this type of testimony was considered by the court in Bridges vs. United States, 199 Fed (2d) 811, where at page 836 it was stated:

> "It is true that a number of witnesses described some of these meetings which Bridges attended, and at some of which he presided, as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at which every other person present was a Party member."

It is apparent therefore that in the instant case, if the testimony of the two government informants were to be believed in their entirety, the most that is contained in the

record is that the appellant attended certain meetings at which all others present other than the appellant were Communists. Such evidence cannot be said to be "reasonable, substantial and probative" and is certainly no more than a scintilla. "Such evidence, although inconclusive and insufficient in itself, is relevant to the issue of Party membership." Acosta vs. Landon, 125 Fed. Supp. 434, 438. (Emphasis added.)

Since neither government informant testified as to the same period of time, the testimony of one did not corroborate the testimony of the other in any way. Nor was a documentary evidence of any kind offered at the hearing to substantiate the charge that appellant was a member of the Communist Party. The only evidence presented was the testimony of the two informants.

The record reveals that both government witnesses were being paid for their services as witnesses. "When the amount of his pay depends upon the discoveries he is able to make, then that man becomes a dangerous instrument." Sopwith vs. Sopwith, 4 S. W. and T. R. 243, 247, 164 Eng. Rep. 1509. It is established law that the testimony of paid professional witnesses should be received with great caution and reserve. District of Columbia vs. Clawans, 300 U. S. 617; Allen vs. Allen, 285 Fed 962, Moller vs. Moller, 115 N. Y. 466.

As was stated in Fletcher vs. United States, 158

Fed (2d) 321 at Page 322:

"Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witnesses' own interest. Here, admittedly, the usefulness -- and for which he received payment from the agent -- depended wholly upon his ability to make out a case. No other motive other than his own advantage impelled him in all that he did. And when to this is added the well recognized fact that a drug addict is inherently a purjurer where his own interests are concerned, it is manifest either that some corroboration of his testimony be required, or at least that it should be received with suspicion and acted upon with caution. The rule in this jurisdiction for a quarter of a century has been to require that a jury be warned in the case of evidence given by a detective engaged in the business of spying for hire."

Nor should the rule of law be any different because one of the informant witnesses became a member of the Communist Party at the suggestion of the FBI. "I cannot adopt the contention that Government spies are any more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry. Except in time of war, when a Nathan Hale may be a spy, spies are always necessarily drawn from the unwholesome and untrustworthy classes. A right minded man refuses such a job." Colver vs. Skeffington, 265 Fed 17, 69.

The record further reveals that Rosser had been convicted of crimes involving moral turpitude, could not testify in any detail whatever concerning his own personal background, although his testimony is detailed concerning alleged attendance at meetings of the appellant, and admitted falsification of school records, as well as admitting having had examinations at a university taken in his name by another. The witness Scarletto, as the evidence showed, was extremely loose with the truth, on one occasion stating that he had collected dues from the appellant on "four or five occasions", at another stating that he had collected dues "about ten times", and at a third time stating that he had collected dues "at least several times". This witness also admitted answering falsely a questionnaire for employment concerning his own membership in the Communist Party. Although reviewing courts do not

review all the facts de novo, the substantial evidence rule applies to the evidence when reviewed from the entire record. Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, and the courts can review all the facts, even the issue of credibility. N. L. R. B. vs. Universal Camera Corporation, 190 Fed (2d) 429. It has also been held that it is the major responsibility of the courts to review the evidence. N. L. R. B. vs. Pittsburgh Steamship Company, 340 U. S. 498. The Special Inquiry Officer's findings are entitled to respect but they must nevertheless be set aside when the record clearly precludes the Special Inquiry Officer's decision from being justified by a fair estimate of the worth of the testimony of witnesses. Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, 490.

Both government witnesses admitted the telling of falsehoods; one testified in great detail concerning the appellant but could supply no similar details concerning his own personal life; the other made contradictory statements concerning the alleged payment of dues by appellant; neither witness corroborated the testimony of the other in any degree; the testimony of neither was substantiated by documentary evidence of any kind; both testified to appellant's attendance at alleged Communist Party meetings but there is a "logical fallacy" in concluding that appellant must have been a Party member from this testimony and such testimony is "inconclusive and

nsufficient in itself". Both witnesses were paid informers nd the testimony of such witnesses should be scrutinized closely for the purpose of determining whether it is olored in such a way as to place guilt upon a defendant n furtherance of the witnesses' own interest". It cannot e stated that the record contains more than a mere cintilla of evidence concerning appellant's alleged Communist Party membership and that such evidence alls far short of being "reasonable, substantial and robative" evidence.

2. THE ADMINISTRATIVE ORDER OF DEPORTATION RESTS UPON AN UNSOUND LEGAL PREMISE, DRAWING AN INFERENCE OF GUILT FROM APPELLANT'S SILENCE AT THE DEPORTATION HEARING, AND MUST BE REVERSED EVEN THOUGH THE DEPORTATION ORDER COULD HAVE RESTED ON VALID PREMISES.

The decisions of the Special Inquiry Officer, and of the Board of Immigration Appeals in dismissing appellant's appeal, relied in part on appellant's silence at the deportation hearing. Thus it is stated on page 1 of the Opinion of the Board of Immigration Appeals that

the finding of prior membership in the Communist Party "is based on the testimony of two government witnesses and the alien's own refusal to testify in the course of the deportation proceedings, on advice of counsel". The Opinion continues on page 2: "He [the Special Inquiry Officer] also found it buttressed by the respondant's failure to testify, on the grounds that where, as here, there was a duty to speak, silence is evidence of a most persuasive character".

Previous court decisions have held that it is permissible to draw inferences from silence in deportation cases, but these same decisions considered that the scope of judicial review was limited to a determination of whether or not the hearing was fair. United States ex rel Bilokumsky vs. Tod, 263 U. S. 149; United States ex rel Vajtauer vs. Commissioner of Immigration, 273 U. S. 103. This was because prior to the passage of the 1952 Immigration and Nationality Act, the validity of deportation orders could be reviewed only by proceedings in habeas corpus. Heikkila vs. Barber, 345 U. S. 229. Therefore, the scope of review was limited to determining whether or not the alien had obtained a fair hearing. The language of the 1952 Immigration Act, however, requires that deportation orders be based upon reasonable, substantial and probative evidence and therefore the courts are no longer limited in determining only whether or not the hearing accorded the non-citizen

was fair but must also determine whether or not the evidence produced meets the statutory requirement. The older cases which allowed inferences to be drawn from silence did so from the point of view of determining merely whether or not the hearing accorded was a fair one, but they did not determine whether or not the record contained reasonable, substantial and probative evidence to support the deportation order.

Moreover, even when an inference from silence was drawn, it was drawn only when the court held that there was a duty upon the defendant to speak. Thus in the case of United States ex rel Vajtauer vs. Commissioner of Immigration, 273 U. S. 103, the court states as follows at page 111:

> "Attention is directed to the fact that the refusal to testify was based upon the supposed right of the witness not to be called upon to testify until all the evidence in support of the warrant was presented, and it is said that if silence is induced by a person's 'doubts of his rights or by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence.' Citing Conn. vs. Kenny, 12 NETC 235, 237; People vs. Pfanschmidt, 262 Ill 411, 499.

But these cases merely apply the rule that no inference may be drawn from silence when there is no duty to speak, a rule which is not applicable where the witness is sworn and under a legal duty to give testimony which is not privileged." (Emphasis added.)

In the Vajtauer case, the alien was sworn in the proceedings and the court drew an inference from his silence, but recognized the principle that no inference from silence should be drawn when the person was not sworn and there was no duty to speak. The appellant in the instant case was not sworn and did not testify on the grounds that the burden was on the Immigration and Naturalization Service to prove its case by reasonable, substantial and probative evidence without the testimony of appellant. (Tr. of Rec., P. 6.) No duty to speak was therefore upon appellant.

In the case of United States ex rel Bilokumsky vs. Tod, 263 U.S. 149, the alien stood mute as to the issue of alienage and alienage was inferred from his silence. However, the court stated in that case at page 154: "Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him". The Supreme Court thereby recognized a further exception to the rule that guilt can be inferred from silence by implying that no inference could

be drawn from silence when the testimony called for could be incriminating. There can be no question that the testimony called for in the instant case could be incriminating.

Further, the very phrase that "silence is evidence when there is a duty to speak" assumes that there is a duty upon the alien to speak in deportation proceedings when in truth and in fact the burden of proving the grounds for deportation rests upon the Immigration and Naturalization Service and not upon the alien. U. S. ex rel Belfrage vs. Shaughnessy, 113 Fed Supp. 56.

However, whatever the rule may have been concerning the permissibility in certain instances of an inference from silence in a limited review afforded by habeas corpus proceedings, it cannot be said that in face of the new standard of review imposed by the statute applicable here that silence of the appellant is an item of reasonable, substantial and probative evidence. Even under the old standard courts did not consider a failure to testify to be anything more that supporting evidence of a case already made out by other evidence. In United States vs. Reimer, 79 Fed (2d) 315, the court stated at page 317:

"While the relator's refusal to answer as to his belief in the overthrow of organized government may have some evidential force . . . it is no more than a scintilla

n the setting here. We have not yet reached the point where proof of one's belief can rest solely upon his refusal o answer questions concerning it." And it is clear that when the silence is occasioned by questions which could be ncriminating, such silence is not evidence.

"But whatever the underlying motivation, an invocation of the Fifth Amendment is no ground at all for an inference of guilt or of criminal proclivities. The privilege created by the amendment 'is for the innocent as well as the guilty' and no inference can be drawn against the person claiming it that he fears that he is 'engaging in doing something forbidden by Federal law'. Spector vs. United States, 9 Cir. 193 Fed (2d) 1002 at Page 1006. Wigmore on Evidence, 3rd Ed., Vol. VIII, Section 2251. For the history of the constitutional privilege see Judge Frank's dissenting opinion in U. S. vs. St. Pierre, 2 Cir., 132 Fed (2d) 837, 842, 147 A. L. R. 240. And since an invocation of the amendment made on legally sufficient grounds does not give rise to an inference of substantive criminality, of course an invocation made upon insufficient grounds may not serve as a basis for such inference.

At most, an improper refusal to testify, if persisted in -- as seems not to have been the case here -- might constitute grounds for conviction of criminal contempt."

United States ex rel Belfrage vs. Shaughnessy, 212 Fed (2d) 128, 130. And see Blau vs. U. S., 340 U. S. 159; Emspak vs. U. S., 349 U. S. 190.

Whatever inference may have been allowed under a limited review in habeas corpus proceedings, under the new standard of review the silence of an alien at his deportation hearing should not be construed as supplying a gap in the proof. United States vs. Holton, 222 Fed. (2d) 340.

The decisions of the Special Inquiry Officer and the Board of Immigration Appeals rest upon an unsound legal premise, that of drawing an inference from appellant's silence, although the statute requires that findings be based upon reasonable, substantial and probative evidence. Under such a statute there was no justification in placing any reliance upon appellant's silence. Since the order of deportation was based upon an unsound legal premise, it must, for that reason alone, be remanded for further administrative determination. See N. L. R. B. vs. Virginia Electric & Power Company, 314 U. S. 469; S. E. C. vs. Chenery Corporation, 318 U. S. 80; Federal Power

Commission vs. Idaho Power Company, 344 U. S. 17, 20.

3. APPELLANT WAS DENIED A HEARING BEFORE AN OFFICER APPOINTED, QUALIFIED AND ASSIGNED PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT AND WAS DENIED A FAIR HEARING PURSUANT TO THE TERMS OF SAID ACT.

The court below found that the Special Inquiry Officer who presided at the deportation hearing was not appointed, qualified or assigned pursuant to the provisions of Section 11 of the Administrative Procedure Act (Finding of fact VI, Tr. of Rec., P. 32) and that the Special Inquiry Officer was subject at all times to the supervision and control of the Attorney General (Finding of fact VII, Tr. of Rec., P. 32).

Appellant contends that he was entitled to a hearing based upon the terms of the Administrative Procedure Act and was entitled to have presiding at that hearing a Special Inquiry Officer appointed, qualified and assigned pursuant to that Act. Marcello vs. Bonds, 349 U. S. 302, held that under the terms of the 1952 Act deportation proceedings were exempt from the hearing provisions of the Administrative Procedure Act. But that case did not decide nor even consider the applicability of Section 11 of

he Administrative Procedure Act concerning the appointment, qualification and assignment of hearing officers. "The issue here presented is whether the Congress reversed itself in the 1952 Immigration Act and, in effect, reinstated he Sung case by making the hearing provisions of the Administrative Procedure Act directly applicable to deportation proceedings." Marcello vs. Bonds, 349 U.S. 302, 305.

The opinion of Mr. Justice Clark in the Marcello case rests upon the proposition that the language appearing n Section 242 (b) of the 1952 Immigration Act stating that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section" was sufficiently explicit to overcome the wording of Section 12 of the Administrative Procedure Act that "no subsequent legislation shall be held o supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly". But there is no unanimity to this point of view. As was pointed out by Mr. Justice Black at page 316:

> "Both the Procedure Act and the 1952 Immigration Act were sponsored by Senator McCarran and Representative Walter. Their original proposals which finally evolved into the 1952 Act did expressly provide that the Procedure Act should not control proceedings

under the Immigration Act. The provision was that 'Notwithstanding any other law, including the Act of June 11, 1946, [the Administrative Procedure Act] the proceedings so prescribed shall be the sole and exclusive procedure for the deportability of an alien who is in the United States' (foot note). Hearings on these proposals brought strong protests from some organizations, including the American Bar Association, against the provision making the Administrative Procedure Act inapplicable to deportation proceedings (foot note). Afterwards the sponsors of the Immigration measures introduced new bills which significantly omitted from that provision the words 'Notwithstanding any other law, including the Act of June 11, 1946 [the Administrative Procedure Act]'. Consequently when the bill finally passed, there was no language which 'expressly' superseded or modified the binding requirement of Section 5 (c) of the Administrative Procedure Act."

And it may further be pointed out that on previous occasions when Congress has seen fit to exempt an agency

from the terms of the Administrative Procedure Act, it has always done so clearly and expressly. For example, Chapter III of the Supplemental Appropriation Act of 1951, Act of September 27, 1950, 64 Stat. 1044, 1048, stated: "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007)." Similarly worded statutes have been passed in regard to agencies dealing with problems other than that of Immigration. Thus, Section 16 of the Rubber Act of 1948, 62 Stat. 108, 50 U. S. C. A. App. Section 1935 (Supp.) 1952, states: "Functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act except as to the requirements of Sections 3 and 10 thereof." Section 5 of the Second Decontrol Act of 1947, 61 Stat. 323, 50 U. S. C. A. App. 1900, provided that: "The functions exercised under Title III of the Second War Powers Act, 1942, as amended (including the amendments to existing law made by such Title), and the functions exercised under Section VI of such Act of July 2, 1940, as amended, shall be excluded from the operations of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of Sections 3 and 10 thereof." Also, Section 7 of the Export Controls Act of 1949, 63 Stat. 9, 50 U. S. C. A. App. 2027, provided that: "The functions exercised under this

Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237), except as to the requirements of Section III thereof."

An additional form of the clear and express exemption or exclusion from the terms of the Administrative Procedure Act used by Congress was to amend Section 3(a) of the Administrative Procedure Act itself by adding to the list of named exclusions to the Act therein contained. Thus, the Veteran Emergency Housing Act of 1946 was excluded in this manner, 60 Stat. 918, 60 Stat. 993; as was the Sugar Control Extension Act of 1947, 61 Stat. 37; and the Selective Service Training Act of 1940, 61 Stat. 201; as well as the Housing and Rent Act of 1947, 61 Stat. 201.

Therefore, in view of the fact that the exclusion of the hearing provisions of the Administrative Procedure Act is only implied by language contained in the 1952 Immigration Act, and such an implied exclusion is a novel departure from the express exclusion required by the Administrative Procedure Act, the exclusion should not be broadened to cover provisions of the Administrative Procedure Act pertaining to the appointment, qualification and assignment of hearing officers, especially when said provision of the Administrative Procedure Act was not even considered by the court in the Marcello case. This is all the more true since the practice of comingling of functions in administrative agencies remains condemned

y the courts regardless of the decision in the Marcello ase. Wong Yang Sung vs. McGrath, 339 U. S. 33.

4. THE 1952 IMMIGRATION AND NATIONALITY ACT VIOLATES THE CONSTITUTION.

A. THE CONSTITUTION APPLIES TO ALIENS AS PERSONS AND DEPORTATION AS A POWER.

From the earliest date in our national history, it vas made clear that the constitution is superior and paramount law to enactments of Congress. Thus, it was stated by the Supreme Court in Marbury vs. Madison, Cranch 137, 177:

> "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."
>
> "The authority of constitutions over governments and of the sovereignty of the people over constitutions are truths which are at all times necessary to be kept in mind; and at no time like the present."

Madison's Report on the Virginia Resolution, 4 Elliott's Debates, Page 550.

Although cases have stated that the power of Congress in dealing with immigration and deportation is plenary, Galvan vs. Press, 347 U. S. 522; Harisiades vs. Shaughnessy, 342 U. S. 580; Carlson vs. Landon, 342 U. S. 524, this must of necessity be subordinate to the ultimate plenary power which lies in the people as expressed in the Constitution. Under the Constitution, only the people as a whole are sovereign and only their authority is plenary. All laws enacted by Congress are subordinate and governed by the provisions and confines of the Constitution.

Thus it has been held specifically that the Constitution applies to aliens as persons. See Bridges vs. California, 314 U. S. 252; Yick Wo vs. Hopkins, 118 U. S. 356; Bridges vs. Wixon, 326 U. S. 135, 148; Schneiderman vs. United States, 320 U. S. 118. Aliens are entitled to protection of the Fifth and Sixth Amendments in criminal proceedings, Wong Wing vs. U. S., 163 U. S. 228; they may invoke the writ of habeas corpus to protect their personal liberty, Nishimura Ekiu vs. U. S., 142 U. S. 651; they are entitled to economic opportunity, Yick Wo vs. Hopkins, 118 U. S. 356; and property cannot be taken from aliens without just compensation, Russian Volunteer Fleet vs. U. S., 282 U. S. 481.

It is equally clear that the Constitution also applies to deportation as a power. See the Japanese Immigrant case (Yamataya vs. Fisher) 189 U. S. 86; Fong Yue Ting vs. United States, 149 U. S. 698; Wong Wing vs. United States, 163 U. S. 228. The law is undisputed that the Constitutional guarantee of due process applies, at least as to the procedure in deportation proceedings, and the hearing given persons charged with deportable offenses must be fair and must abide by fundamental procedural safeguards. Kwock Jan Fat vs. White, 253 U. S. 454; Yamataya vs. Fisher, 189 U. S. 86; Kwong Hai Chew vs. Colding, 344 U. S. 590; Wong Yang Sung vs. McGrath, 339 U. S. 33; Heikkila vs. Barber, 345 U. S. 229; Johnson vs. Eisentrager, 339 U. S. 63; Bridges vs. Wixon, 326 U. S. 135; Kessler vs. Strecker, 307 U. S. 22; Shaughnessy vs. Mezei, 345 U. S. 206; Galvan vs. Press, 347 U. S. 522; Carlson vs. Landon, 342 U. S. 524; United States ex rel Vajtauer vs. Commissioner, 273 U. S. 103; United States ex rel Bilokumsky vs. Tod, 263 U. S. 149; Tang Tun vs. Edsell, 223 U. S. 673.

The parent case of the doctrine that Congress has "plenary" powers in the field of deportation is that of Fong Yue Ting vs. United States, 149 U. S. 698. This case held that the Chinese Exclusion Act of 1892 was valid and constitutional over the objections that the provisions of the Act violated the due process clause. The authority of that

case has seriously been undermined in several respects. First, the Fong case assumed the power of Congress to discriminate in deportation on the basis of race alone whereas government discrimination on the basis of race alone has recently been held to violate the Constitution. Shelley vs. Kramer, 334 U. S. 1; Barrows vs. Jackson, 346 U. S. 249; Brown vs. Board of Education, 347 U. S. 483, second opinion 349 U. S. 294; Bolling vs. Sharpe, 347 U. S. 497, second opinion 349 U. S. 294. The Fong case is further undermined as precedent because it was decided prior to the decision in the numerous cases listed above holding that aliens in deportation proceedings are entitled to procedural due process. The Fong case was antedated by Kwock Jan Fat vs. White, 253 U. S. 454, but in that case the alien claimed to be a United States citizen and it was there held that he was entitled to procedural due process.

Further, the Fong case confuses the issue of deportation with that of exclusion and also confuses and glosses over the power of a sovereign government to exclude or expel non-citizens with the limitations on that power contained in the due process clause of the Constitution. One of the sources cited by the majority opinion in the Fong case for the proposition that the government of a sovereign state has the power to exclude or expel aliens makes it clear that this power may be limited by the domestic laws of the country. "The exercise

f this right [to deport aliens] may be subjected, doubtless, o certain forms by the domestic laws of each country; but he right exists, nonetheless, universally recognized and ut in force." 2 Ortolan Diplomatie de la Mer (4th Ed) Chap. 14, P. 297. The "form" of domestic law which imits the right to deport aliens in this instance is the due rocess clause contained in the Fifth Amendment to the Constitution.

> "It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practice of other nations to ascertain the limits? The governments of other nations have elastic powers -- ours is fixed and bounded by a written constitution. The explulsion of a race may be within the inherent powers of a despotism. History,

before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

"Whatever may be true as to exclusion, and as to that see Chae Chan Ping vs. United States, 130 U. S. 581, and Ekiu vs. United States, 142 U. S. 651, I deny that there is any arbitrary and unrestrained power to banish residents even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government, having full control of all matters

relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution. In the case of Monongahela Nav. Co. vs. United States, ante, p. 463, it was said: 'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed

by this 5th Amendment, and can take only on payment of just compensation'. And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication." Fong Yue Ting vs. United States, 149 U.S. 738 dissenting opinion of Mr. Justice Brewer.

Appellant does not question "the government's power to terminate its hospitality", Harisiades vs. Shaughnessy, 342 U.S. 580, 587, but maintains that this power or any other power granted to the government by the Constitution must be exercised with fairness and must afford due process of law. Due process limits even the war powers, Hamilton vs. Kentucky Distilleries, 251 U.S. 146; no less does due process limit powers only impliedly granted by the Constitution.

B. THE IMMIGRATION AND NATIONALITY ACT VIOLATES DUE PROCESS IN THAT THE STATUTE NEITHER ESTABLISHES NOR IS PURSUANT TO ANY REASONABLE STANDARD, NOR IS IT RATIONAL, NOR DOES IT GIVE ADEQUATE WARNING OR HEARING RIGHTS.

The Immigration and Nationality Act establishes as a basis for deportation merely the fact of prior membership or association in a named organization, the Communist Party. This basis of deportation is established without reference to any standard of conduct or without a charge, trial or a hearing being given the named organization and is obviously an attempted exercise of arbitrary power unlimited by any reasonable standard.

In the case of Yick Wo vs. Hopkins, 118 U. S. 356, it was stated at page 369 and 370 by the Supreme Court that:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the

play and action of purely personal and arbitrary power . . . But the fundamental rights of life, liberty and the pursuit of happiness considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the glorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws, and not of men'. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

It is immaterial that the arbitrary attempt to exercise the power in the instant case is asserted by Congress. Thomas Jefferson, in his Notes on the State of Virginia, page 195, has stated:

"It will be no alleviation, that these powers will be executed by a plurality of

hands, and not by a single one. One Hundred and seventy-three despots would surely be as oppressive as one. As little will it avail us, that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the power of government should be so divided and balanced among several bodies of magistracy, as that no one could ever transcend their legal limits."

And as has been said by Mr. Justice Douglas, concurring in Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 177:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws not of men."

Under our constitution nothing can be law which "is purely arbitrary and acknowledges neither guidance nor restraint". Yick Wo vs. Hopkins, Supra, at page 367. Accord: Musser vs. Utah, 333 U. S. 95, 97.

Stated another way, law in our system "cannot be arbitrary fiat" but rather "must be the result of a process of reasoning . . . This is inherent in the meaning of 'determination'. It is implicit in a government of laws and

not of men." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 136.

Law without reason offends the most elementary concept of ordered society and a law without standard also offends elementary concepts of society.

> "No reason for it is shown, and a conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong . . . The imprisonment of the petitioners is therefore illegal and they must be discharged." Yick Wo vs. Hopkins, 118 U. S. 356, 374.

A law which is "irrational" is therefore unconstitutional and no law at all. Perez vs. Sharp, 32 Cal (2d) 711, 713. Under our Constitution law may not depart from reason. Pot vs. United States, 319 U. S. 463; Morrison vs. California, 291 U. S. 82; Bailey vs. Alabama, 219 U. S. 219; Prentis vs. Atlantic Coast Supply & Company, 211 U. S. 210, 226; and Opp Cotton Mills vs. Administrator, 312 U. S. 126, 145.

> "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property." Western and Atlantic Railroad vs. Henderson, 279 U. S. 639, 642.

"it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland vs. American Sugar Company, 241 U.S. 79, 86.

Thus statutes have been held "void for vagueness" United Stated vs. Cohen Grocery Company, 255 U.S. 81; Lanzetta vs. New Jersey, 306 U.S. 451; A. B. Small Company vs. American Sugar Refining Company, 267 U.S. 233. The rule of these cases that overly vague standards are void standards under the Constitution is not confined to criminal prosecution only.

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful, or stripping a participant of his rights under it, was equally within the principle of those cases." A. B. Small Company vs. American Sugar Refining Company, Supra,

The Supreme Court has said that to penalize or convict a man "upon a charge not made would be sure denial of due process". Dejonge vs. Oregon, 299 U. S. 353, 362. The statute which penalizes and convicts on a charge never formulated in the law offends the fundamentals of due process even more violently.

The statute at bar condemns membership in an organization without any hearing whatever for the organization. True, the individual is afforded a hearing to ascertain whether or not he was a member of such organization, but the assumption that membership in said organization is deportable nowhere receives a hearing.

It is fundamental in the law that as to the most humble matter of right, interest, liability or property, any and all men are entitled of right to a hearing before being adjudged liable and accountable under any law. Under law every threatened or affected man "is entitled, upon the most fundamental principles, to a day in court". Coe vs. Armour Fertilizer Works, 237 U. S. 413, 423.

This principle also is not limited to criminal areas but applies to civil matters as well, and particularly where penalties, forfeitures or intrusions upon liberty are entailed.

"Notice and opportunity to be heard are fundamental to due process of law. We

would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. See Coe vs. Armour Fertilizer Works, 237 U. S. 413, 424, 59 Law. Ed. 288, 298, 58 S.Ct. 149; Re: Oliver 333 U. S. 257, 273, 92 Law. Ed. 682, 694, 68 S. Ct. 499." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 178, Mr. Justice Douglas concurring.

"Are these acts of the legislature which effect only particular persons, and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone, and first: It (the law) is a rule, not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform and universal; therefore, a particular act of the legislature to confiscate the goods of Titius or to attaint him of high treason, does not enter into the idea of a municipal law, for the operation of this act is spent upon Titius only, and has no relation to the community in general . . . By

the law of the land is most clearly indicated the general law -- a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not therefore to be considered the law of the land. If this was so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony; judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country."

5 Webster's Works 487, set forth in full in

Dartmouth College vs. Woodworth, 17 U. S. 250, 278-9, 4 Wheat 517, 580-2.

Legislation affecting particular individuals or groups by name was described in In Re Campbell, 64 Cal App 300, 302, as "so far afield of any reasonable conception of the exercise of legislative power of this country, as it is defined, qualified, and limited by our constitutions, that the specific ground upon which or reason for which its invalidity is to be declared is of no material consequence".

And as was stated by the Supreme Court of California in Communist Party vs. Peek, 20 Cal (2d) 536 at Page 549:

> "For example, it is clearly within the power of the legislature to determine as a fact that, in the public interest, all diseased cattle should be destroyed, but it is not within the legislative power to determine that John Smith's cattle are diseased."

And as was said by Mr. Justice Brewer in his dissent in Fong Yue Ting vs. U. S., 149 U. S. 698, 742:

> "It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guaranties of these Amendments can be thus ignored,

in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?"

C. THE STATUTE AT BAR IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

In naming the Communist Party, and listing membership in the Communist Party prior to the date of the law's enactment, as a ground for the penalty of deportation, the statute involved constitutes a bill of attainder and an ex post facto law. Although it has been said that deportation is not criminal and therefore the bill of attainder and ex post facto provisions of the Constitution do not apply, what is required to render applicable these protective guarantees of the Constitution is punishment, not criminality. Conceded by the cases is the fact that imposition of some civil penalties may be sufficiently punishing in purpose and effect as to lie within the protected area of immunity. See Cummings vs. Missouri, 4 Wall 277; Ex Parte Garland, 4 Wall 333; United States vs. Lovett, 328 U.S. 303 (disqualification from professions); Pierce vs. Carskadon, 16 Wall 234 (denial of access to the courts); Burgess vs. Sammon,

)7 U. S. 381 (exaction of tax); and Fletcher vs. Peck, 6 Cranch 87 (seizure of property).

Although deportation cases are civil in form, deportation may be as severe a punishment as loss of livelihood. Bridges vs. Wixon, 326 U. S. 135, 154. It nay "deprive a man of all that makes life worth living", Ng Fung Ho vs. White, 259 U. S. 276, 284; and "deportation is a drastic measure and at times the equivalent of banishment or exile". Fong Haw Tan vs. Phelan, 333 U. S. 6, 10.

Although "deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure", Harisiades vs. Shaughnessy, 342 U. S. 580, 594, the courts, nevertheless, have held that because of the drastic consequences of deportation substantially the same due process standards that apply in criminal cases should also apply in deportation cases. Jordan vs. DeGeorge, 341 U. S. 223; Bridges vs. Wixon, 326 U. S. 135; Fong Haw Tan vs. Phelan, 333 U. S. 6.

The test for the application of ex post facto and bill of attainder prohibitions established by the decisions is whether the statute creates an impersonal qualification of privilege or imposes a penalty with an eye to compliance with rules of conduct.

Thus in Hawker vs. New York, 170 U. S. 189, at 198,

ıe court stated:

> "It was held that, as many of the matters provided for in these oaths, had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses."

In Dent vs. West Virginia, 129 U. S. 114, at 126, ıe court said: "As many of the acts from which the arties were obliged to purge themselves by the oath had ɔ relation to their fitness for the pursuits of the profession esignated, the court held that the oath was not required as means of ascertaining whether the parties were qualified ɔr those pursuits and professions, but were enacted ecause it was thought that the act deserved punishment nd that there was no way of inflicting punishment except y depriving the parties of their offices and trusts."

The statute at bar clearly involves punishment and ıe concept of moral conduct and individual responsibility nd cannot be compared to a judgment of purely impersonal isability. Implicit in the membership in the proscribed rganization is the judgment of supposed advocacy of or elief in the overthrow of the government by force and

violence. Membership without such imputed individual culpability and responsibility would, as to any organization, be pointless in relation to a deportation order. Hence are applicable the Constitutional guarantees against bills of attainder and ex post facto laws.

The statute, in that it imposes penalty by name alone, also is similar to the lettre de cachet used in the French Monarchy prior to the French Revolution.

> "The lettre de cachet was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the 18th Century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesque, among others, denounced the use of the lettre de cachet and it was abolished after the French Revolution, though later temporarily revived by Napoleon." In Re Oliver, 333 U. S.

257, 269, citing 13 Encyclopedia Britannica 971; 3 Encyclopedia Social Science 137.

To apply a statute adopted in 1952 to appellant, whose alleged membership in the Communist Party occurred some years before is to enforce an ex post facto law and bill of attainder against the appellant. A similar argument, it is true, was rejected in Harisiades vs. Shaughnessy, 340 U. S. 580 and this rejection was not departed from in Galvan vs. Press, 347 U. S. 522, and Marcello vs. Bonds, 349 U. S. 302, but in Harisiades the retroactive basis for deportation was voluntary membership in an organization advocating violence, conduct long proscribed by criminal law, while the statute at bar provides that membership in a named organization be the basis for deportation. At the time this statute was enacted, membership in the Communist Party had not been made illegal. To the contrary, the Supreme Court had said as recently as June 21, 1943 in Schneiderman vs. U. S., 320 U. S. 118, 157:

> "A tenable conclusion from the foregoing is that the Party desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted counter-overthrow once the Party had obtained control in a peaceful

manner, or as a method of last resort to enforce a majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

The statute here is a legislative enactment aimed t punishment of a proscribed class. Because of its etroactive effect, it constitutes an unconstitutional ex post acto law as well as a bill of attainder. Were it not for the act that "the slate is not clean", "it might fairly be said lso that the ex post facto Clause, even though applicable nly to punitive legislation, should be applied to deportaion". Galvan vs. Press, 347 U.S. 522, 531. But the bsence of a "clean slate" has not prevented the courts rom righting an error in the proper case, even though ver-ruling many years of precedent.

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy vs. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." Brown vs. Board of Education, 347 U.S. 483, 492.

"If only a question of statutory

construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a Century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." Erie R. Co. vs. Tompkins, 304 U. S. 64, 77.

Equally compelling should be the abandonment of the unconstitutional doctrine that the implied power of deportation transcends the express substantive provisions of due process.

D. THE STATUTE AT BAR VIOLATES FREEDOM OF SPEECH AND ASSOCIATION.

Membership alone in an organization is made a ground for deportation by the instant statute. Scienter and individual understanding are disregarded. Not only is the record naked of any evidence concerning individual culpability or of organizational wrong-doing but government witness Rosser testified that he and appellant "worked together in the unemployed movement on demonstrations, grievance committees, delegations to the relief headquarters of the State, of the County, we

went to all types of sections of the County, Belvedere, Inglewood, problems and so the only thing I saw him doing was working daily in the unemployed movement". (S. R. 28)

> "We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose although called by that Party. The defendant was nonetheless entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty." DeJonge vs. Oregon, 299 U. S. 353, 365-366.

To impose a penalty and a disability upon members of an organization without any regard to individual action not only obviously abridges freedom of speech and association but also punishes, by deportation in the instant case, the exercise of the most fundamental constitutional rights necessary if the market place of ideas is to remain open.

> "The greater the importance of

safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."
DeJonge vs. Oregon, 299 U. S. 353, 365.

CONCLUSION

Because of the numerous constitutional prohibitions violated by the 1952 Immigration and Naturalization Statute and the fact that the charge against appellant was not supported by reasonable, substantial and probative evidence, nor was appellant afforded the type of hearing required by law, the decision below should be reversed and appellee should be restrained from deporting appellant.

Respectfully submitted,

IRWIN GOSTIN

Attorney for Appellant

No. 14881

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO, acting officer in charge of the Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

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FILED

JAN - 5 1955

PAUL P. O'BRIEN, CLERK

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No. 14881

IN THE

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FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO, acting officer in charge of the Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellant, plaintiff below, sought to enjoin enforcement of an order and warrant of deportation outstanding against him, and to have said order and warrant declared invalid [R. 1-8].[1] The District Court entered judgment in favor of appellee [R. 28]. The Court below had jurisdiction under the provisions of Section 10 of the Act of

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[1]References to the typewritten Transcript of Record will be indicated "R". References to appellant's deportation hearing contained in a certified record of the Immigration and Naturalization Service, received in evidence as an exhibit and considered in its original form, will be indicated by "S.R."; while references to exhibits received in evidence at the deportation hearing will be indicated by "S.R. Ex." References to appellant's brief will be indicated by "Br."

June 11, 1946, commonly referred to as the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)); and its judgment being a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

Statement of the Case.

Appellant is an alien, a native and citizen of Mexico [R. 24, S. R. Exs. 2 and 3]. He was lawfully admitted to the United States in 1919, and has been a resident of the United States continuously since that time [R. 24, S. R. Ex. 2]. On September 1, 1953, a warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging that appellant was subject to deportation under the Immigration and Nationality Act[2] in that after entry during May, 1919, he had been a member of the Communist Party of the United States; and on October 14, 1953, this warrant of arrest was served on appellant [R. 24, S. R. Ex. 1].

A deportation hearing was held at Los Angeles, California, on October 26, 1953 [S. R. 1-5], November 10, 1953 [S. R. 6-32], and November 19, 1953 [S. R. 33-137]. At this hearing, two witnesses, Louis Rosser [S. R. 15] and Daniel Scarletto [S. R. 102], testified on behalf of the Government as to appellant's membership in the Communist Party of the United States. Upon the advice of counsel, appellant refused to be sworn [S. R. 1, 6, 9], and refused to answer all questions [S. R. 1-3, 9-14, 135], except two questions relating to counsel by whom he was

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[2]Section 241(a)(6) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., §1251(a)(6).

represented [S. R. 3-4]. Appellant cross-examined the witnesses introduced by the Government [S. R. 33-100, 109-134]; however, he offered no evidence or witnesses in his own behalf [S. R. 136]. At no time did appellant claim the privilege against self-incrimination as a ground for his refusal to answer questions.

On December 17, 1953, the Special Inquiry Officer who presided at the aforementioned deportation hearing rendered his decision, ordering that plaintiff be deported from the United States pursuant to law on the charge contained in the warrant of arrest. An administrative appeal was taken by appellant from the decision of the Special Inquiry Officer to the Board of Immigration Appeals and on June 16, 1954, said Board dismissed appellant's appeal.

On June 24, 1954, based upon the aforementioned order of deportation, a Warrant of Deportation was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, directing that appellant be deported from the United States.

On July 28, 1954, appellant filed a Complaint in the Court below, seeking to enjoin enforcement of the Order and Warrant of Deportation outstanding against him and seeking to have said order and warrant declared invalid [R. 1-8]. The District Court upheld the validity of the order and warrant of deportation and entered judgment in favor of appellee. This appeal from that judgment raises the following questions:

1. Is the finding that appellant is subject to deportation because he was a member of the Communist Party supported by reasonable, substantial and probative evidence?

2. Is the order of deportation outstanding against appellant rendered invalid because an inference was drawn from appellant's silence at the deportation hearing?

3. Is the order of deportation outstanding against appellant rendered invalid because the Special Inquiry Officer who presided at appellant's deportation hearing was not appointed, qualified and assigned pursuant to the Administrative Procedure Act?

4. Do the provisions of the Immigration and Nationality Act under which appellant was ordered deported, violate the Constitution?

Statutes Involved.

Section 241(a) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., Section 1251(a), provides in pertinent part:

> "Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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> * * * * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *."

Section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A. Section 1252(b), provides in pertinent part:

> "(b) A special inquiry officer shall conduct proceedings under this section to determine the deporta-

bility of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

* * * * * * * *

(4) no decision of deportability shall be valid unless it is based upon reasonable substantial, and probative evidence."

Section 101(b)(4) of the Immigration and Nationality Act, 66 Stat. 171, 8 U. S. C. A., Section 1101(b)(4) provides:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe."

ARGUMENT.

I.

Summary.

The standard embodied in the Immigration and Nationality Act requiring reasonable, substantial and probative evidence to support an order of deportation is not new in deportation proceedings, but was applied by courts prior to this Act in habeas corpus proceedings. In determining whether this standard has been met, a court of review will not substitute its judgment for that of the immigration authorities, but will invalidate an order of deportation only if the alien would have been entitled to a directed verdict in his favor had the issue of his deportability been tried before a jury.

There is reasonable, substantial and probative evidence to support the finding that appellant was a member of the Communist Party. The uconntradicted testimony of two witnesses, former members of the Communist Party, identified appellant as having been a member of the Party at the same time; as having attended numerous meetings of the Communist Party which were restricted solely to members, and some of which were restricted to leaders of the Party; as having paid dues to the Communist Party; as having frequented Communist Party headquarters; and as having participated in picnics, mass meetings, and picket lines sponsored by the Communist Party. Confronted with this testimony, appellant remained silent. He did not testify or offer any evidence whatever in his own behalf.

Appellant did not impeach the testimony of these witnesses. The minor discrepancies developed during cross-examination, relating for the most part to collateral mat-

ters, were of little significance. They were not "paid informers" as appellant seeks to label them, but witnesses. Moreover, the credibility of witnesses is for the determination of the trier of facts, in this instance the Special Inquiry Officer.

An inference was properly drawn from appellant's silence at the deportation hearing. The fact that he refused to take an oath does not preclude this inference, since he was under a legal obligation to be a witness and could have been compelled to take the oath. While there is authority to the effect that an inference may be drawn from silence even though the privilege against self-incrimination is claimed, the present decision need not extend so far, since appellant did not assert the privilege. In the absence of a claim, the privilege may not be considered. Moreover, independent of the inference drawn from appellant's silence, there is reasonable, substantial and probative evidence to support the finding that he was a member of the Communist Party.

The Special Inquiry Officer was not required to be appointed, qualified or assigned pursuant to the Administrative Procedure Act, since the Immigration and Nationality Act expressly provides for his appointment and supervision. This would seem to have been settled by *Marcello v. Bonds,* 349 U. S. 302 (1955).

Since the decision by the Supreme Court of *Galvan v. Press,* 347 U. S. 522 (1954), reh. den. 348 U. S. 852, the constitutionality of the statute under which appellant was ordered deported is no longer an open question.

II.

The Finding That Appellant Is Subject to Deportation Because He Was a Member of the Communist Party Is Supported by Reasonable, Substantial, and Probative Evidence.

A. Standard of Proof Required.

Appellee concedes that a decision of deportability to be valid must be supported by "reasonable, substantial and probative evidence." (Sec. 242(b)(4) of the Immigration and Nationality Act, 66 Stat. 210, 8 U. S. C. A., Sec. 1252(b)(4); see also, Sec. 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Sec. 1009(e).) However, appellee disagrees with the position of appellant that this standard is a novelty in deportation proceedings (Br. 6, 21). While in the Administrative Procedure Act and the Immigration and Nationality Act, Congress adopted the "substantial evidence"[3] rule, in so doing it merely codified and made definite a standard which the courts were already applying upon the review of deportation orders in habeas corpus proceedings.

Maita v. Haff, 116 F. 2d 337, 338 (C. A. 9, 1940);

Kielema v. Crossman, 103 F. 2d 292, 293 (C. A. 5, 1939);

Daskaloff v. Zurbrick, 103 F. 2d 579 (C. C. A. 6, 1939);

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[3]The terms "reasonable" and "probative" would seem to add nothing, since these terms are included within the concept of "substantial evidence." See, *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197 (1938), at page 229, where substantial evidence is defined as follows: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion. . . ." And on page 230 the Court indicated that evidence would not be substantial if it was without a "basis in evidence having *rational probative force.*"

Morrow v. Tillinghast, 35 F. 2d 183, 184 (C. C. A. 1, 1929);

Palmer v. Ultimo, 69 F. 2d 1, 2 (C. C. A. 7, 1934);

United States ex rel. Schlimmgen v. Jordan, 164 F. 2d 633, 634 (C. C. A. 7, 1947).

In framing the evidentiary requirements of Section 242(b)(4), Congress did not consider that it was setting up new standards. The bills which culminated in the 1952 Act emerged from a detailed and intensive study of our immigration and naturalization systems made by the Senate Judiciary Committee. In 1950 the Committee rendered a comprehensive report (S. Rep. 1515, 81st Cong., 2d Sess.) entitled "The Immigration and Naturalization Systems of the United States," *embodying the Congressional understanding of existing law* upon which the 1952 Act was based. On page 629 of this report the Committee stated:

> ". . . In a habeas corpus proceeding, based on a deportation case, the Court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is *substantial evidence* to support the order of deportation." (Emphasis added.)

In determining whether substantial evidence exists to support an order of deportation, a Court will not substitute its judgment for that of the immigration authorities (*Taranto v. Haff,* 88 F. 2d 85, 87 (C. C. A. 9, 1937)). The present order of deportation should be declared invalid *only if appellant would have been entitled to a directed verdict in his favor had the issue of his membership in the Communist Party been tried before a jury* (*N. L.*

R. B. v. Columbian Enameling and Stamping Company, 306 U. S. 292, 300 (1939); Stason, "'Substantial Evidence' in Administrative Law," 89 U. of Pa. L. Rev. 1026, 1035-1051).

In *United States v. Fulkerson,* 67 F. 2d 288 (C. C. A. 9, 1933), this Court enunciated the rule governing directed verdicts in the following language (p. 290):

> "It is well settled that, if there is any substantial evidence to which the jury may properly give credence and which, viewed in its most favorable aspect, would sustain a verdict favorable to the plaintiff, then the court is not authorized to enter an order of dismissal or to direct the jury to return a verdict for defendant. * * *."

Other cases illustrating this rule are:

Gunning v. Cooley, 281 U. S. 90, 94 (1930);

Butte Copper & Zinc Co. v. American, 157 F. 2d 457 (C. C. A. 9, 1946);

United States v. Hartley, 99 F. 2d 923, 925 (C. C. A. 9, 1938).

B. Testimony of Louis Rosser—Summary.

Witness Rosser testified that he (the witness) was a member of the Communist Party of the United States in Southern California from 1932 up to December, 1944 [S. R. 16]; that he was a full time functionary in the Communist Party from about three months after he joined until about six months before he quit the Party [S. R. 19]; that he (the witness) held various positions of leadership in the Communist Party [S. R. 17-18].

That appellant was present at a meeting, taking place during the summer of 1939, of a fraction of the Workers Alliance [S. R. 19]; that about ten persons attended

this meeting [S. R. 24]; that the meeting was attended only by top Communists within the Workers Alliance [S. R. 25]; that the witness and other leaders of the Communist Party had planned the meeting in advance [S. R. 72, 73]; and that the meeting was devoted to the policy and program of the Communist Party being pushed through the Workers Alliance [S. R. 25];

That appellant was present at a meeting of the Communist Party during 1939; that about twelve persons were present at this meeting; that the witness spoke at this meeting on the Party's program of mobilizing the unemployed to fight against the war effort [S. R. 21]; that the meeting was restricted solely to members of the Communist Party of the United States; and that he (the witness) knew this because he was responsible for the work of the unit which was meeting [S. R. 21];

That appellant was present at a conference in the fall of 1939 held at Embassy Hall, Los Angeles, California [S. R. 25]; that the purpose of the conference was to give the Communist leaders the facts of why Stalin made a pact with Hitler [S. R. 25]; that this conference was restricted solely to members of the office staff of the County Committee of the Communist Party, Section Organizers, and to delegates assigned by the units of the Communist Party; that the head of each group checked the member's name off at the door [S. R. 26]; that the witness' name was checked off at the door [S. R. 76];

That appellant was present at a meeting in the summer of 1940 of the Communist Party unit to which appellant belonged; that this meeting took place in a private home; that about 8 persons were present; that only members of the Communist Party were present at this meeting; that

during this period every unit organizer had been informed to tighten the reins of the security of the party; and that only members of the Party were notified to attend meetings [S. R. 26-27];

That the witness attended picnics, mass meetings, and picket lines sponsored by the Communist Party, at which appellant was present [S. R. 27]; that appellant and the witness worked daily in the unemployed movement [S. R. 28]; that appellant was on one of the commissions of the Communist Party [S. R. 28]; and that he saw appellant at Communist Party headquarters at various times during the years 1939, 1940, 1941 and 1942 [S. R. 29];

That the last time he saw appellant within the Communist Party was at a conference in the fall of 1942; that this conference was restricted solely to members of the Communist Party, and that it was further restricted to the county committee of the Communist Party, and to those delegates sent by branches, units or fractions; that each person responsible for the group from his delegation was at the door and checked off the people for which he was responsible as they came in [S. R. 29-30];

That to his knowledge, appellant was a member of the Communist Party of the United States from the period 1937 to 1942 [S. R. 30].

C. Testimony of Daniel Scarletto—Summary.

Witness Scarletto testified that he (the witness) was a member of the Communist Party from 1947 to 1952 in the Los Angeles area; that he became a member of the Communist Party at the suggestion of the Federal Bureau of Investigation to secure information for the United States Government; that he was press director when he was in the El Sereno Club of the Communist Party; that

he was organization secretary when he was in the Mexican Concentration Club of the Communist Party; and that as organization secretary he handled the dues and finances and political guidance for the club [S. R. 103-104];

That after he was in the Mexican Concentration Club, he (the witness) was given a list with appellant's name on it; that he first met appellant at a meeting at the home of Gertrude Stoughton in El Sereno; that about 7 or 8 people were present at this meeting; that this meeting was restricted to members of the Communist Party, and that in order to assure that only Communist Party members were in attendance, automobiles were parked several blocks away from the house where the meeting was to be held; and that "we never knew where the meeting was going to be sometimes until about an hour or so before it happened and all the members didn't know at all times where the meeting would be. They were picked up and taken to the meeting" [S. R. 105];

That he was present at probably 15 or 20 other meetings of the Communist Party at which appellant was present [S. R. 107]; that in his position as organization secretary he collected Communist Party dues from appellant on about 10 occasions at the rate of 10 cents per month; and that he turned over the money that he collected for dues to the Section Organizer of the Communist Party [S. R. 107-108, 127-129]; that to his knowledge appellant was a member of the Communist Party of the United States during the period 1949 through 1950 [S. R. 109].

D. Probative Value of the Evidence.

The uncontradicted testimony of two witnesses, former members of the Communist Party, identified appellant as having been a member of the Communist Party of the United States; as having attended numerous meetings of the Communist Party which were restricted solely to members of the Party and some of which were restricted to leaders of the Party; as having paid dues to the Communist Party, as having frequented Communist Party Headquarters, and as having participated in picnics, mass meetings, and picket lines sponsored by the Communist Party. This, in itself, constitutes reasonable substantial and probative evidence of appellant's membership in the Communist Party. Confronted with this testimony, appellant remained silent. He did not testify or offer any evidence whatever in his own behalf. As will be more fully discussed in Part III of Argument, an inference may be drawn from this silence, that appellant was in fact a member of the Communist Party.

Appellant complains that witnesses Rosser and Scarletto did not personally call the meetings described by them or invite persons to attend, concluding that they had no personal knowledge that the meetings were in fact restricted solely to members of the Communist Party. This argument assumes that a fact can only be proved by direct evidence. Circumstantial evidence, however, is not an inferior species, and may serve to prove a fact as convincingly as direct evidence (*Rocona v. Guy F. Atkinson Co.*, 173 F. 2d 661, 665 (C. A. 9, 1949); 32 C. J. S., Evidence, Sec. 1039). In the case at bar the witnesses described in detail the security measures employed to insure that only members of the Communist Party attended the

meetings. Witness Rosser, particularly, was a leader in the Communist Party and was undoubtedly well acquainted with the methods employed to prevent the intrusion of outsiders. Under such circumstances, a weighty inference arises that appellant was a member of the Communist Party of the United States; not only because the meetings which he attended were restricted to members of the Communist Party, but also because of the unlikelihood that one not a member would be present at numerous meetings of the Communist Party at which stringent security measures were taken to insure that only members attended. It is hardly conceivable that appellant's attendance at these meetings was fortuitous.

The language of *Bridges v. United States,* 199 F. 2d 811, 836 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209, concerning the evidentiary value of attendance at "closed" meetings of the Communist Party cannot be lifted out of context and applied to the case at bar. In the *Bridges* decision, a criminal case, Bridges himself, a labor union leader, admitted attendance at Communist Party meetings and admitted that his union was offered and accepted aid from the Communist Party and its paper "The Daily Worker" (199 F. 2d 836-837). Such evidence of cooperation between Bridges' union and the Communist Party might well explain Bridges' presence at meetings of the Communist Party, ordinarily closed, consistent with non-membership. In the case at bar, however, there is nothing to explain why appellant found himself at numerous meetings of the Communist Party, all of them closed, and some of them restricted to top leaders of the Community Party.

Moreover, evidence apart from appellant's attendance at "closed" meetings established his membership in the Com-

munist Party. Appellant paid dues as a member of the Communist Party [S. R. 107-108, 127-129], frequented Party Headquarters [S. R. 29], and participated in carrying out the Communist Party program [S. R. 27, 28]. This is reasonable, substantial, and probative evidence of his membership in the Communist Party. Clearly, appellant would not have been entitled to a directed verdict in his favor had the issue of his membership been tried before a jury.

E. Credibility of the Witnesses.

Appellant cross-examined witnesses Rosser and Scarletto exhaustively concerning age (a matter necessarily based upon information obtained from others), schooling, places of employment, and other collateral matters. The minor discrepancies developed during the course of this cross-examination were of little significance (*Mar Gong v. Brownell,* 209 F. 2d 448, 451-452 (C. A. 9, 1954)).

The cross-examination of witness Rosser concerning his activities while attending school, when tested by judicial standards, did not tend to impeach. Particular acts of misconduct, not resulting in conviction, may not be used for impeachment purposes (*Ingram v. United States,* 106 F. 2d 683, 684 (C. C. A. 9, 1939), and authorities cited therein). Similarly, the few misdemeanors of which Rosser admitted conviction did not afford a basis for impeachment (*Fay v. United States,* 22 F. 2d 740 (C. C. A. 9, 1927); 8 Cyc. of Fed. Proc., Sec. 26.107; Cal. Code Civ. Proc., Sec. 2051.)

Appellant seeks to attack the credibility of witness Scarletto because he stated falsely in an application for employment that he was not a member of the Communist Party when in fact he was (Br. 11). As previously mentioned, witness Scarletto joined the Communist Party at the suggestion of the Federal Bureau of Investigation. Having so joined, he would naturally be expected to conceal his membership in the Party from all except other members and the Federal Bureau of Investigation.

Appellant characterizes witnesses Rosser and Scarletto as "paid professional witnesses" (Br. 13) and "paid informers" (Br. 17). The record will not support this characterization. At the time of the deportation hearings, neither Rosser nor Scarletto were in the employ of the government but were witnesses who received for their services the fee customarily paid ex-Communists who testify in proceedings before the Immigration and Naturalization Service (See U. S. News and World Report, February 18, 1955, page 83, for a discussion of the distinction between witnesses and informers, as well as the range of fees in each class). At the deportation hearings relating to appellant, the fee for each witness was $25.00 per day [S. R. 89, 131]. Witness Rosser testified for two days and witness Scarletto for one day; and they should have received $50.00 and $25.00 respectively. Certainly, these nominal sums, little more than enough to reimburse the witnesses for their absence from employment, can create no inference of bias.

Moreover, the credibility of witnesses, even where the evidence is conflicting, is to be determined by the trier of fact, in this instance the Special Inquiry Officer.

Bridges v. United States, 199 F. 2d 811, 839 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209;

Morikichi Suwa v. Carr, 88 F. 2d 119, 121 (C. C. A. 9, 1937);

Taranto v. Haff, 88 F. 2d 85 (C. C. A. 9, 1937);

Acosta v. Landon, 125 Fed. Supp. 434, 438 (S. D. Calif., 1954).

Bridges v. United States, supra, although it involved an appeal from a criminal conviction by a jury, affords an excellent analogy to a court review of an administrative decision. This Court there declared (p. 839):

> "The question whether these events did or did not occur was typically one for the jury. In general this case presents no circumstances different from those which constantly appear where the testimony of witnesses is sharply in conflict. The special function of the jury, in our system, is to deal with such matters. *No appellate judge is ever in a position to reconstruct for himself, from a printed record, the multitude of things which bring conviction to a juror's mind—the demeanor of the witness, his apparent candor or evasiveness, his assurance or hesitation, and even his facial expressions or the sound of his voice.*" (Emphasis added.)

The rule quoted above should apply with even greater force where, as in the instant case, there was no conflict in the testimony, but where the uncontradicted testimony of witnesses for the government established appellant's membership in the Communist Party of the United States.

III.

The Order of Deportation Was Not Rendered Invalid Because an Inference Was Drawn From Appellant's Silence at the Deportation Hearing.

At the deportation hearing appellant, upon the advice of counsel, refused to be sworn [S. R. 1, 6, 9] and refused to answer all questions [S. R. 1-3, 9-14, 135], except two [S. R. 3-4]. After witnesses had testified concerning appellant's membership in the Communist Party, he offered no evidence or witnesses on his own behalf [S. R. 136]. Appellant now complains that the Special Inquiry Officer and the Board of Immigration Appeals relied in part on appellant's silence. It is well settled, however, that an inference may be drawn from the refusal of an alien to testify on his own behalf in deportation proceedings.

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 111-113 (1927);

Bilokumsky v. Tod, 263 U. S. 149 (1923);

Hyun v. Landon, 219 F. 2d 404, 409 (C. A. 9, 1955), cert. granted, 24 L. W. 3093;

Kunimori Ohara v. Berkshire, 76 F. 2d 204, 207 (C. C. A. 9, 1935);

Saksagansky v. Weedin, 53 F. 2d 13, 16 (C. C. A. 9, 1935).

See also:

Local 167 v. United States, 291 U. S. 293, 298 (1934);

Kirby v. Tallmadge, 160 U. S. 379, 382 (1896);

Wigmore on Evidence, 3d Ed., Vol. II, Secs. 285-289.

Appellant seeks to distinguish the *Vajtauer* and *Bilokumsky* decisions because they were proceedings in habeas corpus, decided prior to the Immigration and Nationality Act of 1952. However, as previously adverted to in Part II A of Argument, the courts required substantial evidence to support an order of deportation, even though the order was reviewed by way of habeas corpus.[4] Moreover, if an inference may arise from silence in deportation proceedings, it is difficult to perceive how the type of review afforded can detract from its evidentiary value.

During the deportation hearing appellant refused to be sworn [S. R. 1, 6, 9]. He now urges that since he refused to take the oath he was under no duty to speak, and that as a consequence no inference can be drawn from his silence (Br. 20). This argument fails to consider that appellant was under a legal duty to be sworn as a witness and could have been compelled to take the oath. An alien in a deportation proceeding against him may be compelled to be a witness, since these proceedings are civil and not criminal in nature (*Bilokumsky v. Tod,* 263 U. S. 149, 155 (1923); and a witness has no right to refuse to be sworn, even though he may have a right,

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[4]The fact that, instead of using the phrase "substantial evidence", the court referred to "some evidence" in *Vajtauer* (p. 106) and to "evidence" in *Bilokumsky* (p. 153) is not controlling. See, *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, 229 (1938), where the Supreme Court found that the Court of Appeals in saying that the record was not "wholly barren of evidence" meant substantial evidence.

when questioned, to refuse to answer on constitutional grounds.

Mulloney v. United States, 79 F. 2d 566, 578-579 (C. C. A. 1, 1935);

O'Connell v. United States, 40 F. 2d 201, 205 (C. C. A. 2, 1902), cert. dismissed 296 U. S. 667;

Wigmore on Evidence, 3d Ed., Vol. VIII, Sec. 2268.

Appellant should not be permitted to avoid the inference which would ordinarily arise from his silence merely because he refused to take an oath which he was under a legal obligation to take.

Appellant also urges that no inference may be drawn from his silence because the testimony called for "could be incriminating" (Br. 21). This Court in *Hyun v. Landon, supra,* ruled that an inference might be drawn from the refusal of an alien to testify in deportation proceedings, even though such refusal was accompanied by a claim of the privilege against self-incrimination. The decision in the case at bar, however, need not extend so far, *since at no time during the deportation hearing did appellant assert the privilege against self-incrimination.* In the absence of a claim, the privilege may not be considered.

Rogers v. United States, 340 U. S. 367 (1951);

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 112-113 (1937);

Wigmore on Evidence, 3d Ed., Vol. VIII, Sec. 2268.

Even if it be assumed that an inference from appellant's silence was improperly drawn, the present order of deportation would not thereby be invalidated; since the testimony of witnesses Rosser and Scarletto alone is sufficient to support the order. The mere fact that incompetent evidence is received and considered in a deportation hearing does not operate to render the proceedings invalid.

Navarrette-Navarrette v. Landon, 223 F. 2d 234, 237 (C. A. 9, 1955);

Hyun v. Landon, 219 F. 2d 404, 408 (C. A. 9, 1955), cert. granted 24 L. W. 3093.

IV.

The Order of Deportation Was Not Rendered Invalid Because the Special Inquiry Officer Who Presided at Appellant's Deportation Hearing Was Not Appointed, Qualified, or Assigned Pursuant to the Administrative Procedure Act.

Appellant contends "that he was entitled to a hearing based upon the terms of the Administrative Procedure Act and was entitled to have presiding at that hearing a Special Inquiry Officer appointed, qualified and assigned pursuant to that Act" (Br. 24). This contention loses all force since the decision by the Supreme Court of *Marcello v. Bonds,* 349 U. S. 302 (1955). In *Marcello,* the Court made it clear that the Administrative Procedure Act had no application to deportation hearings; and that in enacting the Immigration and Nationality Act "Congress was setting up a specialized administrative procedure applicable to deportation hearings" (348 U. S. at p. 308).

Appellant urges that the Supreme Court in *Marcello* "did not decide or even consider the applicability of Section 11 of the Administrative Procedure Act concerning the appointment, qualification and assignment of hearing

officers" (Br. 24-25). Appellee disagrees. While in *Marcello,* it was conceded that the appointment provisions of the Administrative Procedure Act were inapplicable to deportation proceedings, the Supreme Court was careful to place its stamp of approval on this concession in the following language (p. 305):

> "Petitioner concedes that §242(b) of the Immigration Act, authorizing the appointment of a 'special inquiry officer' to preside at the deportation proceedings, *does not conflict with the Administrative Procedure Act, since §7(a) of that Act excepts from its terms officers specially provided for or designated pursuant to other statutes*[5] . . ." (Emphasis added.)

The appointment of special inquiry officers is specifically provided for in the Immigration and Nationality Act, and they are expressly placed under the supervision of the Attorney General. (Sec. 101(b)(4) of the Immigration and Nationality Act, 66 Stat. 171, 8 U. S. C. A., Sec. 1101(b)(4); Sec. 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A. 1252(b)). The Supreme Court was of the view that the appointment, qualification and assignment of special inquiry officers were excepted from the provisions of Section 11 of the Administrative Procedure Act.

To the same effect:

> *Couto v. Shaughnessy,* 123 Fed. Supp. 926, 930-931 (S. D. N. Y., 1954), affirmed 218 F. 2d 758, cert. den. 349 U. S. 952.

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[5]In a footnote to this quotation the Supreme Court observed: "Section 7(a) of the Administrative Procedure Act directs that, in general, administrative hearings shall be held before hearing officers appointed pursuant to §11 of the Act."

V.

The Provisions of the Immigration and Nationality Act Under Which Appellant Was Ordered Deported Do Not Violate the Constitution.

Appellant was ordered deported from the United States under the provisions of Section 241(a) of the Immigration and Nationality Act, as an alien who after entry had been a member of the Communist Party of the United States. He now challenges the constitutionality of this statute on the ground that it violates due process, constitutes a Bill of Attainder and an *Ex Post Facto* law, and violates freedom of speech and association. These contentions, however, have already been rejected.

Galvan v. Press, 347 U. S. 522 (1954), reh. den. 348 U. S. 852;

Harisiades v. Shaughnessy, 342 U. S. 580 (1952), and cases cited therein;

Hyun v. Landon, 219 F. 2d 404, 409 (C. A. 9, 1955).

In *Galvan,* the Supreme Court upheld the validity of Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, which made present or former membership in the Communist Party a ground for deportation. No reason is apparent why the validity of the present statute should not also be upheld. The two statutes, in all essential respects, are identical. The arguments as to unconstitutionality advanced by appellant are no more convincing than those presented to the Supreme Court in the cases cited above. Further contention as to the constitutionality of the statute under which appellant was ordered deported would seem to be foreclosed.

Appellant may feel that since his deportation was ordered pursuant to the Immigration and Nationality Act of 1952, an opportunity is thereby afforded to reopen the constitutional issues raised in *Galvan*. The language of that case, however, precludes any such attitude. Justice Frankfurter, after noting that the constitutional arguments advanced by Galvan were contrary to a long and unbroken line of decisions, concluded (p. 531-532):

> *"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution,* and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. * * *." (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellee, denying the relief prayed for in appellant's Complaint, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

Attorneys for Appellee.

o. 14881

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSE ANGEL OCON,

Appellant,

vs.

LBERT DEL GUERCIO, ACTING OFFICER
N CHARGE OF THE IMMIGRATION AND
NATURALIZATION SERVICE, LOS ANGELES,
CALIFORNIA,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

OCT 2 1952

PAUL P. O'BRIEN, CLERK

IRWIN GOSTIN
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Hollywood 28, California

Attorney for Appellant.

14881

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IN THE UNITED STATES COURT OF APPEALS

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LBERT DEL GUERCIO, ACTING OFFICER
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ATURALIZATION SERVICE, LOS ANGELES,
ALIFORNIA,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE CIRCUIT JUDGES STEPHENS,
EE AND CHAMBERS:

Petitioner respectfully requests that the Honorable udges of this Court rehear and review the decision handed own by this Court on September 26, 1956, wherein the idgment for the United States District Court for the Southern istrict of California, Central Division, in the above entitled ase was affirmed.

I.

STATEMENT OF GROUNDS

This petition for rehearing and review is based upon ıe following grounds: That the interest of justice will best e served by granting a rehearing in this case because the onstitutional questions raised herein and adversely ruled pon by this Court are presently before the United States upreme Court in a pending case, and the decision in that ase must control the Court's ruling here.

II.

ARGUMENT

This Court held that the contention that the 1952 mmigration and Nationality Act violates the Constitution is ithout merit because challenges to the constitutionality of he statute in question on the grounds that it violates due rocess, constitutes a Bill of Attainder and an ex post facto aw, and violates freedom of speech and association have lready been rejected in Galvan v. Press, 9 Cir., 1953, 201 Fed. 2d 302, Affirmed 1954, 347 U. S. 522, rehearing denied 348 U. S. 852, and numerous cases following the Galvan decision. As this Court itself pointed out, however, the decision in the Galvan case involved the Internal Security Act

o 1950, 64 Stat. 987, Title 50 U. S. C. §781 et seq., although
Gain v. Boyd, 14633, 9 Cir., decided August 4, 1956,
____ Fed. 2d _____, held that the reasoning of the Galvan
ase was equally applicable to the 1952 Immigration and
Nationality Act. The case of Rowaldt v. Perfetto, 8 Cir., 1955
28 Fed. 2d 109, was a case raising the unconstitutionality of
te 1952 Immigration and Nationality Act on the same grounds
s raised in the instant case. In the Rowaldt case, the petition
r a writ of certiorari raised two questions, the first being
hether or not Rowaldt's membership in the Communist Party
as sufficient to support a finding that he was deportable on
hat ground or that he had only been a nominal member and
herefore not subject to deportation, and secondly, whether the
952 Immigration and Nationality Act's provisions for deporta-
on of aliens for past Communist Party membership was
nconstitutional on its face or as applied to facts in the instant
ase. See 25 L. W. 3004. The second point raised in the
Rowaldt petition for certiorari covers the constitutional points
raised in the instant case. Certiorari was granted by the
United States Supreme Court on March 26, 1956. 350 U. S. 993
This was an unconditional grant of certiorari covering both
points.

The Rowaldt case was not cited to the Court here in
briefs or in oral argument. By its unconditional grant of

certiorari, the United States Supreme Court indicates that it may not be ready to apply the reasoning in the Galvan case to the 1952 Immigration and Nationality Statute. The case of Rowaldt v. Perfetto is presently scheduled for argument before the United States Supreme Court during the week of October 15, 1956. 25 L. W. 3108. It is respectfully submitted that the decision of the District Court in the instant case should be reheard and reviewed by this Court, and that this Court, in the interests of justice, should await the outcome of the United States Supreme Court's ruling in the Rowaldt case and render its decision on the constitutional points raised herein in conformity with that decisio

Respectfully submitted,

IRWIN GOSTIN
Attorney for Appellant.

IRWIN GOSTIN hereby certifies that he is the attorney of record for the appellant herein, that in his judgment and opinion the within Petition for Rehearing is well founded, and that said Petition for Rehearing is not interposed for any purpose of delay but is submitted solely in the interests of justice.

IRWIN GOSTIN

No. 14,882

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES A. WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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Box 680, Anchorage, Alaska,
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FILED

MAR 20 1956

PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,882

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES A. WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The petitioner herein is a prisoner incarcerated at McNeil Island Penitentiary, where he is serving sentences imposed by the District Courts for the Territory of Alaska for the Third Division at Anchorage and for the Fourth Division of Alaska at Fairbanks.

The petitioner has invoked the jurisdiction of the Court under the provisions of 28 U.S.C. 347, 837, and 1915. The jurisdictional grounds relied upon by the petitioner are not valid.

The relief which petitioner demands from this Court is a writ of certiorari to the District Court for the

Third Division, Territory of Alaska. It appears that the petitioner may be proceeding for the writ under 28 U.S.C. 1651.

STATEMENT OF FACTS.

An indictment was filed by the grand jury of the District Court, Third Division, Territory of Alaska at Anchorage, Alaska, on April 9, 1954, charging James A. Williams of five counts of larceny by check. The District Court promptly set the time for arraignment of the defendant on the indictment for April 16, 1954.

On April 15, 1954, the defendant's chosen counsel, George Grigsby, withdrew. The defendant executed his affidavit of pauperism and John Dunn, an Anchorage attorney, was appointed by the District Judge to represent the defendant.

The defendant was arraigned on the indictment April 16, 1954 and time for entry of plea was set for April 22, 1954. The defendant entered a plea of not guilty on April 21, 1954. Two days later, however, April 23, 1954, the defendant appeared in Court with his counsel, John Dunn, withdrew his plea of not guilty and entered a plea of guilty to the five counts as charged in the indictment. The defendant waived further time for the imposition of sentence and received the following sentence from the District Court: On Count I, one year and one day to serve; on Count II, one year and one day to serve; on Count III, one year and one day to serve; on Count IV, one

year and one day to serve; and on Count V, one year and one day to serve. The sentences were to run consecutively to each other, and the whole were to run concurrently with the previous sentence imposed on the same defendant by the District Court for the Fourth Division, Territory of Alaska, at Fairbanks, Alaska.

On October 14, 1954, Williams moved to set aside the judgment of conviction and sentence and sought to invoke the jurisdiction of the District Court under the provisions of 28 U.S.C. 2255. The petition was denied by the District Judge October 29, 1954 and the District Court filed a minute order directing that the United States Attorney prepare Findings of Fact and Conclusions of Law. The District Court entered an order December 9, 1954, denying the petitioner's application to vacate judgment of conviction and sentence under 28 U.S.C. 2255.

The file of the District Court reveals that on February 17, 1955 there was received a copy of a notice of appeal filed with the United States Court of Appeals for the Ninth Circuit, from the denial of the District Judge to vacate the sentence of the defendant. This notice of appeal was evidently supported by an "Amendment to a motion filed September 29, 1954," in the above cause and by briefs. Apparently the briefs referred to the petition filed October 14, 1954, for vacation of judgment under 28 U.S.C. 2255.

James Williams petitioned a second time to vacate and set aside the sentence and judgment in the District Court. His second petition for vacation of judgment and sentence was filed with the District Court

April 21, 1955. This petition was denied by the District Court by an order dated April 29, 1955.

On June 22, the petitioner filed with the District Court a "Motion to Run Sentences Concurrently." This motion was denied August 5, 1955. On August 5, 1955, the petitioner moved for a "Court Order" to require the United States Attorney to proceed by way of a criminal information against one Robert Jones. This "Motion for Court Order" was denied by the District Court August 17, 1955. The petitioner then filed a notice of appeal from the ruling of the Court denying his petition for the "Court Order" requiring the United States Attorney to proceed in a prosecution of one Robert Jones.

On August 15, Williams filed his third motion to set aside judgment and sentence under Title 28 U.S.C. 2255. On August 17, 1955, the District Court entered an order denying the motion to vacate and set aside the sentence and judgment and set forth that a similar motion had been entertained and denied on previous occasions.

August 29, 1955, the petitioner filed a handwritten notice of appeal with the District Court and on September 16, 1955 followed this with a typed notice of appeal from the ruling of the District Court denying the petitioner's third petition for a motion to vacate the judgment of conviction and sentence.

On October 11, 1955, the petitioner filed a petition for a "Court Order Directed to Mr. William Hilton, Clerk," and on November 10, 1955, this motion for a "Court Order" was denied by District Judge J. L.

McCarrey. On December 12, 1955, a notice of appeal was filed from the denial of petitioner's motion for "Court Order" to Mr. William Hilton.

The files of the District Court contain voluminous correspondence in connection with the petitioner's case. Included in this correspondence are letters from Mr. Williams containing accusations of misconduct on the part of the District Courts, the United States Marshal, United States Attorneys, reporters of the Court and the Clerk of the Courts.

ARGUMENT.

THE COURT OF APPEALS WILL GRANT THE WRIT OF CERTIORARI ONLY IN AID OF ITS APPELLATE JURISDICTION.

Petitioner has filed a petition for writ of certiorari from this Court to the District Court for the Third Division, Territory of Alaska. A reading of the petition does not clearly reveal on what grounds petitioner demands relief. It is clear, however, that a writ of certiorari from the Court of Appeals to the District Court will only issue under extraordinary circumstances. Jurisdiction in the Court of Appeals to grant the writ of certiorari is found under 28 U.S.C. 1651. It has been held consistently that the writ will only issue in aid of the Court's appellate jurisdiction.

Travis County v. King Iron Bridge & Manufacturing Company, (CA 5) 92 F. 690;

United States ex rel. Montana Ore Purchasing Co. et al. v. Circuit Court, Ninth Circuit, District of Montana, et al., (CA 9) 126 F. 169;

Turner v. United States, (CA 8) 14 F. 2d 360;
Minnesota & Ontario Paper Co. et al. v. Molyneaux, District Judge, (CA 8) 70 F. 2d 545;
Lavinthal v. I. T. S. Company, (CA 3) 55 F. 2d 232;
Pickwick-Greyhound Lines, Inc. v. Shattuck, (CA 10) 61 F. 2d 485.

Petitioner has appealed from the order of December 9, 1954 denying his motion to vacate the judgment and set aside the sentence under 28 U.S.C.A. 2255.

This Court on April 7, 1955 dismissed his appeal in the case of James A. Williams v. United States of America, Miscellaneous No. 428.

Petitioner has signed a notice of appeal from the ruling of the District Court on August 5, 1955 for a "Court Order" requiring the United States Attorney to bring criminal proceedings against one Robert Jones. It is clear the United States Attorney has discretion to refuse to bring criminal proceedings and should properly do so under the circumstances here.

Petitioner has filed a notice of appeal from the ruling of the District Court of August 17, 1955 denying his third motion to vacate and set aside the sentence under the provisions of 28 U.S.C.A. 2255. It has been held repeatedly that the courts are not required to entertain successive motions brought under 28 U.S.C.A. 2255.

Petitioner has filed a notice of appeal from the ruling of the District Court of November 10, 1955

for a "Court Order" to the Clerk of the Court requiring Mr. Hilton, the clerk, to furnish the petitioner with the names and addresses of each member of the Grand Jury attending the District Court for the 1955 term. The records and files disclose that the Clerk of the Court, Mr. William Hilton, furnished to petitioner the name of the foreman of the Grand Jury for the 1955 term and the address of the foreman in a letter under the date of October 24, 1955. It is submitted that on the allegations made by this petitioner that this application for a Writ of Certiorari should be denied.

CONCLUSION.

The examination of the files and the records of the District Court should determine that the petitioner here is not entitled to prevail in his application for Writ of Certiorari, and that he is entitled to no other writ or any other form of relief from this Court. His application should be denied.

Dated, Anchorage, Alaska,
March 3, 1956.

Respectfully submitted,

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JAMES M. FITZGERALD,
Assistant United States Attorney,

Attorneys for Appellee.